A NEW CONSTITUTION FOR A NEW AMERICA

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CHAPTER I

THE PRESENT CONSTITUTION

THE present Constitution of the United States, the second which the nation has had, was drafted by a convention of representatives of the States who assembled for that purpose under authority of a resolution adopted in February, 1787, by the Congress of the Confederation. Twelve of the then thirteen States were represented, Rhode Island alone being absent. The draft of the new Constitution was completed in September, and was then transmitted to Congress, which at once submitted it to the legislatures of the States for approval. By July, 1788, conventions in eleven States had ratified the new instrument, and provision was then made by Congress for putting the Constitution into effect and organizing the government under it. Nominally, the new government came into operation on March 4, 1789, but the work of organization was not actually completed until some weeks later. North Carolina, although represented in the convention, did not ratify the Constitution until November, 1789, and Rhode Island delayed until the end of May, 1790.

With the coming into effect of the new Constitution the previous instrument of government, the Articles of Confederation, naturally ceased to be of force. It was expressly provided in the new instrument, however, that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation."

Since the adoption of the Constitution nineteen Amendments have been added to it, but as the first ten Amendments, embodying the so-called Bill of Rights, were all added at one time, in 1791, the process of amendment has in fact been resorted to only ten times. The intervals between Amendments have been very irregular. The Eleventh Amendment, limiting the judicial power of the United States in cases to which the States were parties, was added in 1798. The Twelfth Amendment, which changed the method of choosing the President and Vice-President, followed in 1804. No further changes were made until after the Civil War, when the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments were incorporated. Then followed another long interval of forty-three years without further constitutional change, ending with the adoption of the Sixteenth Amendment, authorizing the imposition of Federal income taxes without apportionment according to population, and the Seventeenth Amendment, providing for the election of

Senators by popular vote, both of which were adopted in 1913. The Eighteenth Amendment, prohibiting the manufacture or sale of intoxicating liquors, adopted in 1919 but not effective until 1920, and the Nineteenth Amendment, which did away with sex discrimination in voting, adopted in 1920, completed the list.

The purpose of the present discussion is to inquire whether or not a further and more fundamental revision of the Federal Constitution is now desirable or necessary. On general principles it would indeed be strange if a national Constitution, framed one hundred and thirty-four years ago for a rural community comprising only thirteen small States and one large but sparsely settled Territory, and containing a total population of less than four million, should continue to meet the needs of a great industrial and commercial nation organized in forty-eight States, with Territories and island dependencies, and containing a continental population of more than one hundred and five million. It would be strange if the profound and far-reaching changes which have taken place during the past century and a third in politics, government, law, economics, and the organization and procedure of society in general should not be found to have outstripped in many important particulars the ancient Constitution still retained by the American people. And it would be indeed a notable tribute to the wisdom of the founders of the republic if a Constitution framed

in the latter part of the eighteenth century, before the French Revolution had opened the way to universal popular government, and before the revolutions and struggles of the nineteenth century had revealed the difficulties with which the progress of democracy was to be hedged about, should continue to hold the devotion or meet the practical needs of a people to whom the problem of self-government now presents itself in novel and acute forms.

It is, of course, often urged that a Constitution, being the fundamental or organic law of a nation, ought to possess a large measure of stability. Just as the Declaration of Independence, while upholding the right of a people to change their form of government, nevertheless points out that "prudence, indeed, will dictate that governments long established should not be changed for light and transient causes," so, it is often argued, the Constitution, dealing as it does with principles and broad outlines which may be regarded as permanent rather than with methods or details which naturally change as social conditions alter, should not be made over every few years, as are many American State Constitutions, in order to conform to political or social opinions of the moment.

Whatever the worth of the argument in theory, its acceptance in practice has less frequently saved the nation from disturbance or disaster than it has served to bolster up reaction and lull the people to indifference; while its inevitable influence in lead-

ing the executive and the courts to resort to strained interpretations of the Constitution in order to make that instrument cover cases to which obviously it was never intended to apply, has undoubtedly weakened popular respect for the Constitution and impaired confidence in both the executive and the judiciary. After all, the proper test of the Constitution is not whether it was good when it was framed or whether it has worked less badly than might have been expected, but whether it is good and sufficient now. If the principles of government which the Constitution embodies and the methods of procedure which it prescribes are as sound today as at any time during the past century and more; if the social philosophy which underlies the Constitution is as acceptable to thoughtful citizens today as it apparently was to equally thoughtful citizens in the period of the Civil War or of the War of 1812 or of the generation which had seen the American Revolution, there would seem to be no compelling reason for going beyond the process of piecemeal amendment which has been followed in the past. On the other hand, if the American people no longer think of politics as they used to think, if the evils from which they suffer are such as the Constitution in its present form cannot remedy and the good which they desire is such as the Constitution cannot insure, then nothing less than a general revision of the instrument can make it fit for present needs.

Fortunately for the peace and safety of the coun-

try, the Constitution itself expressly provides the machinery either for amendment in detail or for revision as a whole. Article V declares that "the Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." It should be observed that while the action of Congress in proposing amendments is permissive only, its action in summoning a convention if the States so request is mandatory. Congress perhaps might, if it chose, refuse to submit an amendment which a majority of the people evidently wanted, but it would be guilty of a gross violation of the Constitution if it failed for any reason to summon a convention which the legislatures of three-fourths of the States had asked for. The fact that the first of the two methods which the Constitution provides, namely, the proposal of amendments by Congress, is the only one which thus far has been employed does not in any way impair the obligation of Congress to call a constitutional convention whenever the people, through their State legislatures, demand one.

The only obstacles in the way of summoning a new Federal convention, accordingly, are such as the people themselves, through indifference or disagreement or lack of solidarity and organization, may interpose. No violent revolution, such as has often had to be resorted to in other countries, is needed to adapt the Constitution to the people's necessities; nor may anyone properly be charged with disloyalty for proposing or debating any changes which to him seem wise. The fact that the Constitution itself, independently of the Congress, the executive, or the courts, provides the machinery for its own amendment gives to every citizen, by necessary implication, the right to consider whether or not that machinery shall be put into operation. The only constitutional limitation upon amendment is the provision in Article V that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." With the Constitution itself imposing only a single restriction upon the length to which the process of change may go, no greater limit of restraint can constitutionally be imposed by government or by public opinion upon those who discuss the subject. The field is open for anyone to enter who will.

CHAPTER II

THE FEDERAL SYSTEM

THE government of the United States under the Constitution is what is known as a federal government—a government, that is, which is formed by a union of States. Representatives of all the States save one which comprised the old Confederation met in convention and, in the name of the people of the United States, drew up a Constitution which all of the States eventually ratified. Provision was made in the Constitution for the admission of new States into the Union at the discretion of Congress; but no new State was to be formed within the jurisdiction of any other State, nor was any new State to be formed by uniting two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of Congress. Special provision was also made for the creation of a district which should be the seat of the Federal Government, and over which the United States alone should have jurisdiction.

For the government of those parts of the American territory which were not included within the

boundaries of any of the original thirteen States no direct provision was made, beyond the general grant of power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." As a matter of fact, however, the Congress of the Confederation had already, while the Constitutional convention was in session, adopted an ordinance creating the so-called Northwest Territory out of which were eventually formed the States of Ohio, Indiana, Illinois, Michigan, and Wisconsin; and had undertaken to admit not less than three nor more than five States therefrom whenever the population was large enough to justify it.

The Federal government thus created was, further, one which is commonly spoken of as a government of delegated powers. The theory of such a government is concisely stated in Article X of the Amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." In other words the States, for the purpose of creating a central or national government which should serve effectively the common interest of all the people, voluntarily transferred to it such of their own powers as they deemed it essential for the nation to possess, and at the same time voluntarily imposed upon themselves numerous obligations and restrictions. To clinch the matter they further agreed that the

Constitution, together with Federal laws and treaties, should be "the supreme law of the land," and that all State courts should be bound thereby "anything in the Constitution or laws of any State to the contrary notwithstanding." In doing this, however, no State appears to have understood that it was parting with anything necessary to its continued existence as a State—to its existence, that is, as a definite, organized, political community. Nothing, apparently, was further from the thought of the convention than that the government of the United States, once the Constitution was adopted, would be free to do whatever it pleased, or even to do all the things that other national governments might be in the habit of doing. The powers of the United States were to be such only as the States, representing the people in their organized political capacity, had granted to it either explicitly or by fair implication. What was not granted was withheld.

Into this Federal union, moreover, the States entered as equals. However much they might differ in size, population, wealth, or economic importance, politically they were to stand upon the same footing. Hence such provisions as that "all duties, imposts, and excises shall be uniform throughout the United States;" that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and that the Constitution shall not be so

amended as to deprive any State, without its consent, "of its equal suffrage in the Senate."

It has long been apparent, however, that while the position of the States as members of the Union remains theoretically the same as it was when the Constitution was ratified, practically their status has greatly changed. The presidential electors in the several States, for example, have long since ceased to exercise any independent choice in casting their votes for presidential and vice-presidential candidates; the growth of the party system and the national nominating convention has destroyed all that by committing the State electors in advance to a choice among a few designated candidates. The Fourteenth and Fifteenth Amendments have made it impossible for any State constitutionally to interfere with the rights which any person enjoys as a citizen of the United States; while Section two of the Fourteenth Amendment makes it possible for the United States in certain cases to punish a State for its conduct of elections for State officers or members of the legislature. Again, the adoption of the Sixteenth Amendment, giving to Congress the right to impose income taxes without apportioning them according to population, has subjected the people of the several States to a Federal tax very different, probably, in character and amount, from what would have been possible without the Amendment; the Seventeenth Amendment, providing for the popular election of Senators, has deprived the State legislatures of the privilege

of electing Senators which they once enjoyed; while the prohibition Amendment (Amendment XVIII) has directly invaded and greatly reduced the so-called police powers of the States.

These, of course, are changes in the text of the Constitution itself. Even more important are the changes which have been brought about by Federal laws and by decisions of the Federal courts. A long list of acts of Congress has in recent years steadily broken down State lines, destroyed or reduced to comparative unimportance State control, and substituted for State authority the authority of the nation. Revenue, commerce, manufactures, railways, mines, forests, water power, oil, food, coal, banks—these are only some of the larger businesses, natural resources, or economic operations the control of which has either passed or else is rapidly passing into the hands of the Federal government. The details of any large business which can be regulated by a State without reference to the United States are now comparatively few and relatively unimportant; it is the Federal government which now, in most essential respects, supervises, controls, or interferes with the ordinary economic life of the community. And when Federal laws are lacking, administrative orders issued under the authority of the President and having in practice the force of law make good the deficiency.

How far the change to centralization has gone,

and the readiness with which it has been accepted, are in general matters of common observation. If the coal supply appears to be diminishing and a coal famine is threatened, or if the distribution of coal to the various sections of the country is thought to be unfair; the Federal government is appealed to to do something about it. If the market price of wheat is too low to satisfy the farmers, the Federal government is asked to fix a price which will make wheat-growing more lucrative. If the high cost of living presses too heavily, it is the Federal government that is appealed to to help reduce it. No considerable strike or industrial disturbance is threatened or actually brought about without the likelihood of urgent appeals to Washington to prevent it, or to adjust it, or to use Federal troops in combating it. So accustomed have we become to Federal interference in ordinary concerns that the States seem at times to forget that they still have, under the Constitution, large powers of their own, and that failure to use those powers not only helps the movement toward Federal centralization but also weakens respect for such State powers as remain. It is well within the truth to say that, thanks to the encroachment of the Federal power upon the sphere of the States and to the general acquiescence of the States in such encroachment, the authority and prestige of the States as governments is approaching the vanishing point.

One should not fail to note, also, the powerful

impetus to centralization which has been given by the Federal courts. With the Constitution itself established as the supreme law of the land and with the State courts bound to uphold it, it was inevitable that the Federal courts should steadily expand the field of Federal jurisdiction at the expense of the States. Very early in the history of the courts the principle that powers not granted to the United States were withheld was transformed in practice into the very different principle that powers not denied, or not reserved to the States, were to be regarded as granted. The result was to bring within the jurisdiction of the Federal courts numerous classes of questions which apparently, had the original intent of the Constitution been followed, should have been left to the States. In their efforts to bring about uniformity of constitutional interpretation and procedure the Federal courts have enormously widened the scope of Congressional legislation and executive control. To-day, most important legal cases arise in the Federal courts or are carried there from State courts. The cases which State courts can decide for themselves without possibility of Federal review are few and insignificant in comparison.

All this means that the States are no longer the independent and virile organizations that they once were. Their powers have been shorn, their initiative has been circumscribed, their independence has

been all but destroyed. Rightfully restrained more and more from hindering the Federal Government, they have more and more lost both the power and the will to do important things for themselves. The obvious tendency is for them to become administrative subdivisions or departments of the Federal government, exercising a certain measure of independent control in minor or local matters, but governed in all the larger affairs of life by Federal laws and Federal regulations. To anticipate that they will ever regain the position in the Union which was originally theirs, or that Federal authority will not continue to wax strong at their expense, is to hope against hope.

If, then, the Constitution is to represent the political organization of the nation as it actually exists at the present time, the provisions relating to the States should be comprehensively revised. It is idle to think of abandoning the Federal system: the States as such will continue to exist. Moreover, the Constitution itself embodies a moral obligation to preserve for each State its equal representation in the Senate. But the duties devolved upon the States by the Constitution, the prohibitions laid upon them, and in general the place assigned to them in the scheme of national government should again be considered in detail and as a whole, to the end that the Constitution in this respect may represent the United States of to-day and not, as at

present, the United States of many years ago.

Before considering further, however, the relation of the States to the Union, some of the other general characteristics of the American Federal system should be examined.

CHAPTER III

RIGIDITY VS. FLEXIBILITY

ONE of the first things that strikes the student of American politics is the extraordinary rigidity which the Constitution gives to the legislative and executive branches of the Federal government. With the exception of South America, where the various republics have copied freely from the practice of the United States, no constitutional arrangement so lacking in flexibility is now to be found anywhere in the world. Instead of a national government whose executive and legislative officials are directly subject at all times to the will of the people, and who therefore may at any time be called to account by constitutional means without anything suggestive of a revolution, the United States has possessed from the beginning a national government two of whose three departments are cast in rigid chronological molds, with the result that they are beyond the reach of the voters and practically beyond the reach even of organized public opinion, save at the stated intervals at which elections are required to take place. While on the one hand the people are powerless

to change the personnel of their national government whenever, unhappily, it may have ceased to represent them properly, they are on the other hand compelled to vote at stated periods on the question of change whether or not at the moment a change is desired.

The President, for example, is elected for a fixed term of four years. During that time he is practically beyond the reach of the people. He cannot be coerced either by the States or by the public or, save under extraordinary circumstances, any other branch of the Federal government. He may listen to advice or petitions, or ignore them, as he chooses. He may act in harmony with Congress or may oppose it, while his powers are so great that he may if he thinks best, go a long way toward thwarting its action and defeating its purpose. There is no way by which he can be compelled to enforce a law, although he is constitutionally bound to do so. The only way to remove him from office before his term expires is to impeach him; and not only is impeachment itself a cumbersome process, but the experience of the country with the impeachment of President Johnson, when if ever, it would seem, impeachment should have been successful, seems to show that the process is also one which at best can be resorted to only at rare intervals. Moreover, if impeachment is attempted, it can only be for "treason, bribery, or other high crimes and misdemeanors"; and most of the things for which even the most un-

popular Presidents have been criticized fall far outside the limits of this constitutional definition.

The members of the two houses of Congress are also elected for fixed chronological terms—the members of the House of Representatives for two years, the members of the Senate for six years. Like the President they may, and not seldom do, act during their terms of office with scanty regard to the wishes or changing opinions of the constituents who elected them. They may indeed be expelled from their seats by their associates for misconduct, and they are, like the President, subject to impeachment; but expulsion and impeachment partake so much of the character of personal punishments for crimes or misdemeanors as to have little bearing on the problem of how best to change a legislative body which no longer represents public opinion.

The interweaving of two-year, four-year, and six-year terms, joined to the fact, not always sufficiently noted by writers on American politics, that an interval of no less than four months intervenes between November, when national elections regularly occur, and March, when the persons elected take office, not only adds to the rigidity which inheres in our constitutional system, but also furnishes conservatism and reaction with weapons of obstruction which they ought not to possess, but which they have long known well how to use. It is true that the elections of Representatives take place every two years, and there are doubtless many persons who will think that two

years is often enough for the reconstitution of a branch of the national legislature. But it must be remembered that approximately two-thirds of the Senators are always holding over, one part with two more years to serve and other part with four. A complete change in the political complexion of the House of Representatives, accordingly, does not involve any change whatever in the political complexion of the Senate. Even if the one-third new members of the Senate who may be chosen at the same time with the Representatives agree politically with the newly-elected House, they may still be effectively checked by the opposition of the two-thirds of the Senate which holds over. Not until a second election, after another two years, may the Senate opposition be broken down, at which time a new House of Representatives is again to be reckoned with.

For the same reason the election of a President is by no means necessarily the all-round party victory which is often supposed. The significance of a presidential election depends very largely not only upon the personality of the candidate who is chosen or the character of the party which elected him, but also upon the political complexion of the two-thirds of the Senate that holds over. If that two-thirds is of the same party as the incoming President and the newly-elected House of Representatives—assuming the former President and House to have been of a different party—there will probably be political

harmony in the new administration; but if the hold-over Senators are opposed to the President the most sweeping victory at the polls or in the electoral college, joined to an overwhelming majority in the new House of Representatives, will not enable the new President to carry out his plans.

The result of this arrangement of fixed terms and fixed chronological rotation in office is to divorce the executive and legislative departments from any close connection with public opinion. Whatever prevailing body of opinion the President or members of Congress may have represented at the time when they were nominated and elected, they largely cease to have any direct or vital relation to it thereafter. At the earliest, none of them can be called to account by the voters until two years after they have been chosen; and even if a large majority of the House of Representatives—the only branch of the government that can be reconstituted even within that long period—is then emphatically repudiated at the polls, the defeated members still have four months in which to continue their repudiated course. There is in practice no constitutional way by which either the President or Congress can be brought promptly to book, once they are seated, if they fail to keep the promises made before the election or to carry through the reforms to which they were pledged.

The United States has not, in other words, a responsible government in any proper or effective sense. Political responsibility which must settle its

accounts with the people only at fixed intervals of two, four, or six years, and settle even then in part only, is in practice not political responsibility at all. What we have, rather, is a species of governmental absolutism which is rendered endurable only because it cannot be indefinitely prolonged. Its inevitable tendency under any circumstances, and its clearly demonstrable tendency throughout our history, has been to widen the gulf between the government and the people, to discourage serious political thinking and debate save at moments of grave crisis, to increase the power of corrupt machine politics, and to cultivate an easy-going indifference to abuses. It is not an accident that American politics are, to the European, frankly uninteresting and hopelessly mechanical. They are so because our constitutional system is ingeniously devised to prevent immediate contact between the national government and the people of, by, and for whom it ought to exist.

For what has become, in this day of widespread popular initiative and control, a glaring anomaly in government we have to thank the so-called fathers of the republic. The men who framed the Constitution and helped to bring about its ratification were not democrats in the modern sense. They did not have even universal manhood suffrage, nor did they believe in it. The French Revolution, with its impressive demonstration of the possibilities of democracy, did not burst upon the world until nearly two years after the Constitution was agreed upon by the

convention. The popular government of which the fathers talked, and which they belived they were embodying in the Constitution, was government not by the people as a whole but by the better born, the better educated, and the better propertied part of the community, The political leaders of 1787 had accepted the doctrine of the Declaration of Independence that all men are created equal, but when they came to frame a Federal Constitution for the new nation they took care to make impossible any direct contact between the people as a whole and the government as a whole, and to protect the government from sudden changes in public opinion. They might well have written into the Constitution, as expressive of their point of view, the words which John Locke, the English philosopher, wrote into the "Fundamental Constitutions" which he drafted for the colony of Carolina in 1667—"that we may avoid erecting a numerous democracy." What they sought was stability and efficiency, a strong central government which should be controlled by the "best men," and which neither the States nor the people could easily affect. The arrangement of fixed chronological terms of office for President, Senators, and Representatives was one of the devices which they adopted to give effect to this idea. No one who studies American history attentively is likely to deny that the device has worked very much as it was intended to work.

How far we have departed in spirit from this

outgrown aristocratic theory of government every intelligent citizen knows. Doubtless there are many who still in their hearts believe that government by the few is the only government that is likely to be either safe, durable, or efficient, and who dread every advance in the direction of immediate popular control as a step toward disorder, inefficiency, and erratic or revolutionary change. But the best thought of the nation to-day looks forward with keen anticipation to the time when the whole people shall be actually enfranchised, when government shall in fact serve the interests of all the people and not primarily the interests of particular classes or groups, and when the people themselves acting through constitutional machinery which they themselves have set up, shall exercise direct control over the government which they maintain. To the masses who hold this view, and whose will must in the long run prevail, the rigid mold in which the presidency and Congress are cast no longer serves the people's needs, but is in fact a bar to the development of genuine popular government in the United States.

Granting that the Constitution at this point is in need of change, what system shall be substituted for the one that is discarded? Order, stability, and efficiency are qualities which any government must possess if it is to live. How can those qualities be insured at the same time that the national government is brought within the scope of popular control?

CHAPTER IV

RESPONSIBLE GOVERNMENT

BROADLY speaking, there are to-day in the world only two forms of government to which a new state, if one were created, would be likely to look for precedents, based upon long experience, for establishing its own national system. One is what is sometimes spoken of as the congressional form. In this form the power of making laws is vested in a congress or legislature of one or two houses, the members of which are chosen for fixed periods at elections held at stated intervals. Of this system the United States is now the oldest and most conspicuous example. The other is what is variously known as the parliamentary or ministerial or cabinet system, or the system of responsible government. In this system the popular or lower house of the legislature, usually much larger in membership than the second or upper house, is chosen for fixed maximum periods, but is subject to change through a new election whenever the ministry or cabinet, having lost the support of the majority in the popular house, decides to appeal to the

country at the polls. Of this form of government the oldest, and in many respects the best, illustration is the government of Great Britain.

The primary difference between the two systems, it should be noted, is the character of the legislature. The nature of the nominal executive of the government is not the fundamental basis of distinction. The nominal executive may be an elected president with very large powers, comparable to those of the President of the United States, or an elected president with very small powers, as in France; or an hereditary monarch with practically no powers at all, as in Great Britain; or an appointed governor-general, as in Canada. The real test is the nature of the legislature. Wherever responsible government prevails the lower house of the legislature, chosen directly by the people at popular general elections, and representing the people not only collectively but in the persons of its individual members as well, controls the execution or administration of the laws as well as the making of them. Through the ministry or cabinet, the members of which hold their offices at the will of the majority in the popular house, the popular house governs the country. There is no constitutional divorce, as in the United States, between the executive and legislative departments, no conflict of policy, no evasion of responsibility. With ministers who are responsible to the legislature and a legislature which is responsible

to the people, the people possess the means of governing as directly as is possible where a large population is concerned.

The nature and methods of parliamentary government in this respect are in general so well understood that any detailed discussion of them is unnecessary here. One or two important characteristics of the system, however, especially significant for the United States may be briefly considered.

The essence of the parliamentary system is government by the majority. In any country in which universal or practically universal suffrage prevails, government by the majority is the only logical as well as the only profitable method of conducting political affairs. Wherever, because of peculiarities in the constitutional system, the majority either does not in practice or cannot in fact govern, one of two things is bound to happen. Either the people, realizing their helplessness, lose interest in their government as a matter of every day concern, and allow the governmental machinery to be run by a few persons about as those persons please, or else they become increasingly hostile to the government and thereby prepare the way for revolution. It would be hard to say which of these two tendencies is the more fatal to healthy political life at any time, but of both of them the political life of the United States at the present moment affords many striking illustrations.

What are the political evils from which American national politics suffer most in our day? Briefly, they are to be found in the existence of a nominal party system kept in perpetual operation by an elaborate and expensive political machinery; in the corrupt use of money in elections; in the adroit framing of party platforms which are supposed to express the beliefs and purposes of a party, but which in fact mean nothing and bind nobody; in the control of legislation by special interests with large funds at their disposal; in the neglect of economic matters affecting the welfare of great sections of the population; in the subordination of the national legislature to an irresponsible executive some of whose most important powers have been usurped; in the growth of a system of executive administration whose acts have in practice the force of law, but which is also practically beyond the reach of the law-making branch of the government; in the generally low state of regard for the courts and the administration of justice; and in the dearth of political leaders whom the people trust.

The evil effect of such conditions is obvious. There is a widespread feeling in the United States that national elections mean very little. In spite of all the time, effort, and money which an election costs, in spite of the temporary interest which is aroused by the selection of candidates and the conduct of a campaign, the impression is pretty general

that the persons who are chosen are quite as much representatives of the political machine or of financial or business interests as they are representatives of the people, and hence that national policies, whatever their character, are very largely beyond popular control. In comparison with most other countries there is little continuous interest in politics among American voters at large. Hence it is that reform movements are likely to be both local and spasmodic, without the power of general conviction which alone can give them driving force. Under a system in which neither house of Congress can be called to account save at fixed intervals of two years, at the same time that even the highest administrative officials can hardly be called to account politically at all, the people have little choice save that of patient endurance. And with small incentive to maintain a keen interest in public affairs, public discussion, in itself the life of a democracy, declines both in volume and in quality.

It is to the congressional system, and not at all to anything peculiar in the history or circumstances or temper of the American people, that is to be attributed the feeling of indifference, the sense of something artificial and unreal, which characterizes American politics save during the brief period of some exciting campaign. To that same system must also be attributed, in considerable measure, the profound and growing unrest and the thinly dis-

guised talk of revolution which are to be found at the present time in all parts of the country. In a community in which, as in our own, government is relatively remote from the people, and in which, accordingly, the power of party machinery and of special interests is both great and continuous, there is usually little charity for new ideas and small tolerance of dissent. The sound principle of majority rule tends to become an instrument for coercing or ignoring the minority, real grievances go unredressed, criticism is stifled or derided, and constructive proposals of change are branded as foolish or seditious. It is in such a political atmosphere that the spirit of revolution grows apace. Doubtless there are social grievances with which no existing form of government has yet shown itself able to cope; doubtless there are new political systems yet to be devised better than those which now commonly prevail. But a government which, because of its rigid constitutional form, is unable easily to respond to widespread changes in public opinion, invites the revolutionary attacks which its supporters and beneficiaries affect to disregard.

The starting-point of any profitable discussion of American politics, accordingly, is a frank recognition of the fact that we have a national government which is irresponsible. The lack of responsibility is not due to changes which have taken place in the four generations that have elapsed since the Con-

stitution was framed; those changes have only increased and emphasized irresponsibility, not created it. The irresponsible nature of the government is imbedded in the Constitution itself—planted there by the fathers of the Republic when the instrument was framed, kept there for more than a hundred and thirty years because the people have not united to demand a change. Only in a remote and theoretical sense have we the "government of the people by the people, for the people" of which Lincoln spoke. The praise of the Constitution in which politicians are wont to indulge only obscures, but cannot hide, the real nature of the system. Nor is the fact to be questioned by pointing to the marvelous growth of the United States as a nation, its maintenance of union in the face of civil war, the superficial prosperity of its people in material things, or its repute among the nations. Such gains, however happy, serve only to emphasize the truth of Viscount Bryce's acute observation that the American people excel all others in making the best of bad conditions. The real test of a government is not the good which has happened under it or in spite of it in the past, but its suitability for the needs of the present and the future. Judged by that standard, the American congressional system belongs to a period which the world has left behind.

The alternative to irresponsible government is responsible government, or the parliamentary system.

Before examining, however, the means by which, if at all, American government can be made responsible, it will be proper to consider some of the objections which are commonly urged either to parliamentary government as such or else to its applicability to American conditions.

CHAPTER V

SOME OBJECTIONS CONSIDERED

THOSE who incline to reject the suggestion that the United States ought to have a responsible government instead of the present irresponsible one commonly do so upon one of two grounds. They either question whether the parliamentary system is as good in practice as it may be conceded to be in theory, or they insist that it could not be expected to work well under American conditions.

It is urged, for example, that in Great Britain and France—to take two familiar illustrations—the people do not control the government and its administration any more directly than they do in the United States. Party machinery in both of those countries, it is insisted, is still necessary and powerful financial or business interests wield a controlling influence, reforms badly needed are not instituted, and popular protests go unheeded. Ministries which have ceased to command the confidence of the people and are severely criticized by large sections of the country and by the press somehow continue to maintain a firm hold upon a majority,

at times a large majority, in the House of Commons or the Chamber of Deputies. As a result, foreign or domestic policies in regard to which the people, and perhaps even the members of the popular house themselves, have never been consulted are formulated and carried out; the opposition, meantime, being left with only the fruitless privilege of attacking the government in debate or in public meetings or in the columns of its newspaper organs. Hence the inference that the parliamentary system, while theoretically leaving ultimate political control in the hands of the people, either does not in practice insure the election of members who fairly represent their constituents at the time of election and who will continue so to represent them during their term, or else that it does not prevent the usurpation of power by a clique of political leaders and the consequent defeat of the popular will.

It is of course true, and presumably it is obvious, that no system of government, however wisely contrived, can insure beyond question the election of good men to office, or can guarantee that those who are elected will be faithful to the pledges which they have given or to the obligations which have been laid upon them. Human nature is an underlying factor in the parliamentary system as in anything else; and if the voters are ignorant or indifferent or do not know their own minds, or if representatives of the people are willing to sacrifice their prin-

ciples and their personal honor for the sake of continuing in office, the doors are open and the self-seeking or unscrupulous may enter and have their way. There is probably no country in the world, whether with a responsible government or not, which has not at one time or another, and even for long periods, illustrated this weakness and defect.

But the alleged facts upon which the criticism is based are themselves in need of scrutiny. Both in the statement of conditions and in the reasoning based upon it is to be detected an error which arises from a failure to observe the nature of public opinion and certain necessary limitations of political action. The House of Commons or the Chamber of Deputies, it is said, repeatedly votes to uphold policies which the people do not approve. The ministry repeatedly adopts policies and forces them upon a reluctant or hostile house. On what grounds are such allegations made? On what premises is such reasoning based? With what measure of truth can it be said that a parliamentary vote does not represent a majority public opinion when nothing approaching a majority of the voters take the trouble to voice a protest? How can a ministry continue to carry out any policy unless, when the crucial test comes, the majority in the chamber either votes to sustain it or refrains from condemning it? The fact that the majority of voters give no indication of disapproval of what their repre-

sentatives have done, the fact that the majority in the house does not withhold its support when the test is made, can have but one meaning. It means that the voters and the members acquiesce; and every politician knows that acquiescence is quite as useful for his purposes as a direct vote in favor. And the politician is right. There can be no middle ground in the matter. Those who are not against a measure or a policy are for it.

What happens, of course, is this. A bill or a policy is denounced by opposition parties or groups as contrary to the public interest. The opposition, in the nature of the case, is a minority, and it seeks to strengthen its position by insisting—what it may indeed honestly believe—that the question at issue does not have the approval of the country. The people, however, have probably not expressed themselves on the question; if they had, no government would be likely to bring the question forward unless the majority opinion had been favorable. If, now, the opposition is unable to turn a minority in the chamber into a majority, and if the people fail to express their opinion in such a way as to make it clear that they oppose the matter now that it has come up for discussion, the ministry, having a majority in the house, is warranted in assuming, as in fact it always assumes, that it would have a majority in the country if the question were voted on at the polls. To draw any other conclusion is to as-

sume either that the opinion of a minority of the members is in fact the opinion of a majority in the country, or else that no seriously controverted issue, and hardly any novel one, ought to be dealt with by a government until the issue has first been passed upon by popular vote. The first of these assumptions is absurd, the second is practically unworkable.

There is further reason for enforcing the argument which has just been outlined, because it helps to place responsibility for the ills of government where responsibility belongs—upon the people themselves. There is a deal of criticism of the irresponsible conduct of presidents, prime ministers, and cabinets which seems to assume that, once a government or an administration has been installed, the people are helpless until some grave crisis opens the way to a change. Under the rigid and irresponsible system which the Constitution of the United States embodies it is unfortunately true that the hands of the people are free only at fixed and infrequent intervals, that remedies cannot be quickly applied, and that what cannot promptly be cured must be impatiently endured. But wherever the parliamentary form of government obtains, members of the popular chamber are likely to be much more sensitive than are Senators and Representatives in this country to changes in public opinion. One reason why they are more sensitive is the fact that the parliamentary system itself interposes no fixed

chronological obstacles to changes in the ministry or in the membership of the house itself. In the absence of general public expression of dissatisfaction, members of the popular house will in general serve out their terms. The majority need not be any more disturbed under that system than under any other at the merely partisan attacks of their opponents. But whenever a fundamental change of opinion, whether manifested in public meetings, or by petitions, or in any other way, is seen to have taken place in the ranks of the voters who elected the members of the majority in the house, that change will usually be found to be quickly reflected in the opinion and conduct of the house itself; and if the house then desires a change of ministry or of policy it is free to act at any moment.

If, then, under a parliamentary system, the business of governing goes wrong, the people have themselves to blame. The people of Great Britain, for example, could at any time have forced the reactionary government of Mr. Lloyd George out of office and obtained another and better House of Commons had a majority of them really desired to do so. The people of France could at any time have put an end to the revengeful and dangerous policy of their government had they really wished to see a different policy prevail. The legislative debates which are certain to follow any decided expression of a changed public opinion have a potential in-

fluence in any country with a responsible government which can never be exerted in a country like the United States, where no change of opinion among the people and no amount of criticism in Congress can force any one out of office before the expiration of a fixed chronological term. In a responsible government the ministry is always in the position of putting its fitness in evidence before the people. In the United States, where there is no ministry and no direct political responsibility, every change of public opinion may with impunity be ignored.

Another common objection is that the parliamentary system, if it actually works as it ought to work, is likely to cause frequent elections; and frequent elections, especially when they come at short notice and at irregular intervals, upset business. It is better, one hears it said, that elections should come at fixed periods, in order that the people may have ample time to prepare for them and that business may not be unduly disturbed. Those who urge this argument commonly point to the prolonged and widespread uncertainty or excitement which precedes an American presidential election every four years as an example of the kind of thing which industry and trade ought not to be expected to undergo often, and least of all at a few days' or a few weeks' notice.

Probably many of those to whom this argument

appeals fail to distinguish between the changes of ministry, which are sometimes frequent and always irregular, in countries having responsible governments, and general elections, which on the whole are likely to occur only at or near the end of the period which the constitution of the country prescribes as a maximum. The picture of frequent and prolonged disturbance, however, which is drawn from our own experience with presidential elections is greatly exaggerated. It is precisely because a presidential election, with the accompanying choice of all the members of the House of Representatives and one-third of the members of the Senate, must occur regularly once in four years that the six, eight, or ten months preceding are overshadowed and upset by the party and personal preparations for it. There can be little question but that most of those preparations have neither political nor social value, and that the time, effort, and money spent upon them are a positive waste. But where responsible government prevails such waste all but disappears. The very fact that a general election may come at any time, even though in practice it does not come often, makes it impracticable to keep up any such colossal and expensive party machinery as is oiled and set going in the United States every four years. From the standpoint of economy alone the parliamentary system has an immeasurable advantage over the American system.

It is further objected, however, that under a parliamentary system the power of the ministry to force a general election at any time may be used merely for partisan advantage or even in a frivolous way. Elections at stated intervals, it is urged, while undoubtedly a restraint upon the people, are also a healthy check upon the government and a protection against hasty or impulsive action.

The history of parliamentary government hardly bears out this contention. Experience shows that general elections are little likely to be forced much in advance of the time at which, under the Constitution, an election must be held, unless the position of the ministry has become so untenable that the business of legislation cannot any longer be carried on. Where such a condition exists, an election clearly ought to be held whether the interval since the previous election is long or short; to go on without one is to paralyze the necessary work of government and render public opinion impotent. The criticism that elections are likely to be ordered on trivial grounds or merely for partisan reasons is sufficiently answered by recalling, first, that a ministry which has the support of the house is not likely to appeal to the country unless it is hopeful of success at the polls; and, second, that if the members of the legislative chamber are themselves so divided in opinion that no ministry can be formed which will receive majority support, a general election is the only solu-

tion. In any case, what is necessary in politics can never be trivial. One of the greatest merits of the parliamentary system is that it compels the people to take the business of self-government seriously.

Another objection, and one which appeals especially to the "practical" politicians who live mainly by tending the political machine, is that the introduction of responsible government in the United States would inevitably tend to break down the two-party system which now prevails; and that the multiplication of small or minority parties, each with its representatives in the national legislature, would lead to confusion and might at any time force the government to rely for its support upon a combination of groups rather than upon a clear majority all of whose members were essentially of one mind. Coalition governments, one is reminded, are proverbially either weak or corrupt. If a government is to command respect it must be honest and strong.

This argument seems to assume that the party system, whatever it may happen to be, is in some way closely dependent upon the form of the government. As a matter of fact, however, the origin of parties is to be found not in the nature of the governmental organization but in the nature of public opinion. It is because people think differently on public questions that they group themselves in parties; and it is in no sense a natural thing, and least of all an

inevitable one, that they should array themselves in only two groups. The two-party system in this country is primarily historical in its origin. When the Constitution was before the States for ratification, there was a natural division into the two groups of those who favored the Constitution and those who opposed it. The Constitution must be either ratified or rejected; no middle course was possible. Hardly had the new government been put into operation before a violent controversy developed between those who favored a liberal interpretation of the Constitution and those who would restrict its scope, and party lines again formed on that question. The point at issue, however, was not at all one of governmental form, but the essentially legal one of constitutional interpretation; and since, down to the Civil War, the issue of slavery kept the question of constitutional interpretation to the front, the two-party system on the whole continued.

Once the question of slavery was disposed of, the peculiar historical reason for the predominance of two parties disappeared. The legal issue of constitutional interpretation changed its form, and tended to decline rapidly in interest, as great economic issues arose. Only in name are the Republican and Democratic parties of to-day like their predecessors. The Democrats who annually dine in memory of Jefferson and Jackson cherish political notions which Jefferson and Jackson would have repudiated. The

Republicans who celebrate Lincoln's birthday are for the most part a party in whose company Lincoln would have been ill at ease. The appearance in the past fifty years of the Prohibition party, the Populist party, the Socialist party, the Progressive party, the Farmer-Labor party, and numerous lesser groups, the formation of "insurgent" factions in Congress and in the country, and the repeated election of presidential candidates who received only a minority of the popular vote, testify to the rapid breaking down of the two-party system as a true expression of public opinion.

It is in every way desirable that the breaking-down process should continue, and that such dominance of two parties as at present exists should wholly disappear. It is desirable that the present elaborate and costly machinery for conducting and controlling elections which the two dominant parties maintain should give way to something simpler, more natural, and less expensive. It is desirable that the formation of numerous parties should be encouraged, partly in order that larger groups may not become too arrogant, and partly that the varying opinions of all sections of the country and all classes of the people may be properly voiced. There is no more fertile source of popular discontent than the ruthless suppression of minority dissent which is likely to occur when a single party, controlling by machine methods a working majority of the national legisla-

ture, enforces its unrestrained will upon the country. The day has gone by when a majority of the American people think alike on any subject. The issues now before the country are such as give rise to much diversity of opinion, and all opinions have a right to be heard at the polls and in Congress. A working coalition of numerous parties, acting together on matters in which they agree while preserving full liberty of criticism and debate in matters about which they differ, is in every respect more logical, more flexible, and at the same time more truly representative of public opinion than the present hard and fast system which leaves increasing numbers of voters without any real representation at all.

The objection that the parliamentary system, while doubtless well adapted to countries like Great Britain or France, is not practicable in a federal government like the United States need not long detain us. So far as the election of members of Congress is concerned the electoral area, or constituency, may equally well be a State, as is the case in the election of Senators, or a congressional district, as is the case in the choice of members of the House of Representatives. The size and political organization of the constituency are not important. The duty of a State to district its area for the choice of Representatives and to provide the necessary machinery for the choice of its two Senators is a formal obligation which has nothing to do with parties or with govern-

mental policies. The State acts in these respects virtually as an administrative subdivision of the United States for the carrying out of a national requirement. The State as a government, distinct from its people as voters, does not express itself at all in a national election.

CHAPTER VI

OUR SO-CALLED CABINET

BEFORE passing to the next important subject which the discussion of a responsible government for the United States involves, namely, the effect of such a change upon the presidential office, a particular aspect of the question which for a number of years has been more or less debated ought first to be considered. That is the contention that the United States can at any time have a responsible government by the simple process of giving members of the so-called Cabinet seats in one or both houses of Congress. It would not be necessary to treat this contention seriously were it not for the fact that the discussion of it has produced a considerable literature, and that a good many persons appear to have been led into mistaking a mere formal change of no practical importance for a real change of nature and principle.

The argument is in substance this. If the members of the Cabinet were given seats in the Senate and House, or in the House alone, with the privilege of debate—the privilege of voting is not insisted upon and in any case would probably require a consti-

tutional amendment—they would form a bridge between the President and Congress which is now lacking. They would be able to explain executive policies to the chamber openly or before committees, and to defend the policies in debate. By this means they would not only be able to exercise a considerable influence upon the course of legislation, but would also, as mouthpieces of the President, keep the views of the President constantly before Congress and thereby help to enforce executive opinion. On the other hand, the executive itself would profit by the change, and would be to some degree restrained by it, since the members of the Cabinet would always be subject to interrogation and would have to defend themselves and their chief if attacked.

The utter futility of such an arrangement as a method of bringing about responsible government in this country ought to be apparent to any one who examines attentively the origin of the body known as the Cabinet and the nature of the powers of its members.

Neither the word Cabinet nor any corresponding term occurs in the Constitution. The only Constitutional basis, and that a remote and indirect one, for the institution is the provision in Article II, Section two, that the President "may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating

to the duties of their respective offices." At the time the Constitution was drawn up, in 1787, there were already in existence under the Confederation three executive departments—foreign affairs, finance, and war; and a postmaster-general had also been appointed. Neither of these departments was in any way concerned with controlling the policy of the Confederation Congress, nor were they represented in that body; on the contrary, they were regarded simply as administrative organizations dealing with particular aspects of government business, and subject in all respects to congressional direction and control.

The Constitution, which perpetuated all the features of the Articles of Confederation that were thought useful, recognized executive departments as existing and, in anticipation of their continuance, brought them into relation with the newly-created office of President. In creating an executive branch of the government, which had been lacking under the Articles, the executive departments were naturally placed to some extent under the control of the new executive head. But the Constitution did nothing more. It neither specified the duties of the executive departments nor defined their authority nor gave them names. It did not recognize their administrative heads collectively as a body of advisers to the President; on the contrary, they were apparently expected to give advice only when asked to

do so, and then only in writing and on the particular branches of public business which had been severally assigned to them. There is nothing in the Constitution to indicate that they were expected to be consulted on matters of general policy.

The limitations of written opinions and departmental business were soon abandoned. Washington consulted his heads of departments on general matters, and later Presidents did the same thing. In other respects, however, the treatment by successive Presidents of the "principal officers" who, following the familiar British usage, early came to be known collectively as the Cabinet, has largely conformed to the plain constitutional intention. Some Presidents have consulted their Cabinets regularly or frequently, some only irregularly or infrequently or not at all. Some have apparently been much influenced by their Cabinets, others very little. The Cabinets have by no means always been happy families of political brethren; quarrels have been frequent, sharp divisions have occurred on important or trivial questions, and favorite members have been trusted or consulted while others have been ignored. No President has in practice recognized his Cabinet as a constitutional body of advisers whose opinion he was bound to consult and by whose advice he was bound to be guided. It has always been assumed that the responsibility for executive action lay with the President and not with the President and his Cabinet. Even the right of a Cabinet officer to independent judgment in the affairs of his own depart-

ment has been repeatedly denied, at the same time that committees of Congress have asserted the right to interrogate Cabinet members without consulting the President.

There can be no question whatever but that this is the true constitutional theory of the American Cabinet. Save for the fact that the members are charged with the administration of particular departments of government business, they bear no resemblance to what in responsible governments are known as ministers. They are essentially chief clerks with administrative and not political functions. They are appointed by the President and hold office subject to his pleasure. In the performance of their duties they act for the President and, save as their duties are regulated by law, they are assumed to act under his direction and in accordance with his wishes. When their opinions regarding the business with which they are charged cease to harmonize with those of the President they should resign, and if they do not resign they may rightfully be dismissed. They have, in short, neither political functions nor an independent status, and they are in no way responsible for anything that the President may do. None of them would be forced out of office if the President were impeached, and any one of them may be impeached without prejudicing the tenure of his colleagues or that of the President. The fact that certain Cabinet officers have been designated by Congress as successors to the presidency in the event of the death or removal of both the President and

Vice-President does not in the least change their constitutional status in the interval before that contingency arises.

It should be obvious, therefore, that the mere giving of seats in either house of Congress, with the privilege of debate, to members of the Cabinet would not change the national government from an irresponsible to a responsible one. Indeed, such action would not be so much as a first step in that direction. The members of the Cabinet would still be what they are now—chief clerks responsible to the President, appointed and dismissed by him at pleasure. Nothing that Congress might do could compel their dismissal, nothing that they themselves could do would force a dissolution of Congress and an appeal to the country. The only policy that the Cabinet would represent would be the policy of the President; and so long as the policy of the President continues to lack any necessary connection with the policy of Congress, and each branch of the government may go its own way with small regard to what the other does, mere devices for enabling Congress and the President to communicate more readily with one another are unworthy of serious attention. They cannot establish responsibility because they cannot establish policy, and they cannot establish policy because the President and Congress are not required by the Constitution to work together.

CHAPTER VII

PRESIDENT AND PREMIER

It has already been pointed out that in a responsible government the ministry or cabinet must be acceptable to the majority in the legislature, and must resign whenever its acts or its policies cease to have the support of that majority. It has also been shown that in the United States the body known as the Cabinet could by no possibility be transformed into a real ministry by the device of giving the members seats in either house of Congress, because they would still be appointed by the President and subject to his direction and control. The only "government" or "ministry," in the European sense, in this country is the President himself; and the President, save for the remote possibility of impeachment, is to all intents and purposes beyond the control of Congress or of the people. We have now to inquire what changes it would be necessary to make in the position and duties of the President, as laid down in the Constitution, in order to transfer the control of policy from the hands of one man, where it never should rest, to the representatives of the people in Congress, where it of right belongs.

The constitutional powers and duties of the President are in part specific and in part general. By specific provision he is made commander-in-chief of the military and naval forces; he may grant reprieves and pardons; he may make treaties, subject to ratification by the Senate; he nominates and appoints all Federal officials whose appointments are not otherwise provided for in the Constitution or by law, and receives ambassadors and other representatives of foreign powers; he may summon Congress or either house in special session, and may adjourn them if they cannot agree upon the time of adjournment. Bills and resolutions require his signature before they become law, unless he chooses to allow them to become law by holding them for ten days without signing them; and he may interpose his veto in the case of bills which he disapproves, subject to the power of Congress to pass such bills over the veto by a two-thirds vote of each house.

The general powers and duties of the President are fewer in number, and mainly such as would belong as a matter of course to the executive head of any government. His oath of office binds him to "preserve, protect, and defend the Constitution" to the best of his ability. He is required to give to Congress from time to time "information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." He is further required to "take care that the laws be faithfully executed."

The actual powers of the President, as everyone knows, far transcend these comparatively simple and obvious limits. The obligation to recommend to the consideration of Congress "such measures as he shall judge necessary and expedient" has grown into the practice of framing and championing national policies, drafting bills or prescribing their terms, putting executive pressure upon Congress to pass the measures submitted, and holding over Congress the threat of a veto in case bills of opposite tenor are passed. The right to make treaties has been interpreted to include participation in great world settlements in which the United States was only remotely concerned, to favor alliances to which the historical policy of the United States was opposed, to commit the United States to foreign policies in regard to which neither the Senate nor the people had been consulted, and to attempt to force the Senate to accept treaties which a majority of that body opposed.

In the development of American politics, moreover, the President has become a party leader. Whatever machinery the party which elected him may devise for the control of its members or the formulation of its policies, the President is the party head. It is he who determines in the last analysis not only what the party shall profess to believe, but also, and in virtually complete details, what it shall do. It is as the actual head of a party that

he recommends legislation to Congress and insists upon its acceptance; it is as head of a party that he appeals to the country in messages or addresses if his wishes are opposed or defeated. Appointments and removals in the diplomatic service and in the civil service at home, while in recent years somewhat restricted by law and by an aroused public opinion, are still, in the case of the more important offices, made with a view to party advantage or in response to party demands; while the "faithful execution" of the laws has never failed to be as partial or irregular as party feeling required. The fact that Congress, when its majority has been of the same party as the President, has usually sustained him, and that the legislation needed to put his policies into effect has been forthcoming, does not alter the fact that it is from the President and not from Congress that the inspiration, the direction, and the compelling force have mainly come.

A little scrutiny is sufficient to show that the presidential office, in the condition in which we now have it in practice, combines in one person three different kinds of functions—executive, administrative, and legislative. As chief executive of the nation the President is expected to see that the Federal laws are executed, and in addition he is charged with the command of the army and navy, with immediate dealings with foreign governments and their repre-

sentatives, with the appointment of numberless officials, and with the general representation of the national government on public or ceremonial occasions. In these respects his duties are similar to those of the heads of many other governments. His administrative duties comprise the supervision of the vast machinery by which the everyday business of government, outside of what is seen to directly by Congress or the courts, is carried on. It is to assist in this great task that the so-called executive departments whose heads form collectively the Cabinet have been created by Congress. In addition to all this the President shares largely in the work of legislation, partly by his possession of the veto power, partly by his constitutional obligation to propose measures for the consideration of Congress, and partly by his usurped power of formulating national policies and bringing political pressure of various kinds to bear upon Congress to accept them.

It goes without saying that all three classes of powers, executive, administrative, and legislative, are proper and necessary. Nowhere except in the United States, however, are such vast comprehensive powers lodged in the hands of a chief magistrate who is not only not elected directly by the people, but who is also in no way responsible to the legislature, who is largely independent of the courts, and who can be called to account by the people only at an

election, and that a secondary one, held once in four years. The President of the United States is the most powerful ruler in the world; but his power, both in its nature and in its extent, resembles far more closely that of a Russian Tsar or a German Emperor under the old régime than that, for example, of a Prime Minister of Great Britain. The presidential office is the most striking example of irresponsible government to be found to-day in any well-organized state anywhere.

Yet it should be remembered that the enormous power which the President has gathered into his hands is the natural result of such a system of government as the Constitution provides. Doubtless it was the intention of the framers of the Constitution that the President should confine himself to executive and administrative duties, and that the formulation of national policies should be left to Congress. From this point of view the veto power may be looked upon as a useful check upon unwise or hasty action by Congress, and not at all as a whip with which to coerce Congress into doing the President's bidding. But the status which the Constitution gives to Congress is such as to make the shaping of policies by that body almost impossible. The Congress itself, thanks to the fixed terms of its members, is as irresponsible in its way as the President is in his. The Senate and the House share the legislative power of the government equally, save

that revenue bills must originate in the House; and even in the matter of revenue bills the Senate exercises a practically unlimited power of amendment. There is no provision for a congressional leadership which shall direct the business of both houses, and none has been developed in fact except on those occasions when the majority in each house has happened to be of the same party. None of the heads of departments is directly responsible to Congress for the conduct of his department, and the House of Representatives is practically the servant of the Senate in the matter of treaties.

Naturally, then, if there is to be national leadership it must come from the President. It cannot come from the President and Congress jointly because the Constitution provides no method of insuring that the President and Congress shall be of the same party. Unless the ship of state is to drift while Congress spends time in debate, the President must take the helm. It is he who must assume to speak in the name of the people and tell the Congress what it ought to do. It is he who must lead and dominate the party which has elected him. Unless he can do so there will be no policy, and there may be chaos.

If the United States is to have a responsible government, it can only be by such change of the Constitution as will give to Congress the control of policy. This can only be done, in the first place, by

creating a ministry or administration—the particular term is not important—which shall represent the majority, and which shall give way to another ministry or administration when the majority no longer supports it; and, in the second place, by stripping the President of the control of policy which he now has. The office of President would still be one of dignity and power, a prize to be striven for; but the control of the country's fortunes would rest where, in any democratic state, it ought to rest—in the hands of the people acting through their elected representatives. Only by such changes can the nation rid itself of the one-man power which has become its bane, and recover the control of government for the people themselves. The problem is not how best to deal with a constitutional system which somehow has gone wrong, because the system works precisely as it was bound to work with the lapse of time and under the pressure of national growth. The problem is how best to change the system.

CHAPTER VIII

A RESPONSIBLE GOVERNMENT IN OUTLINE

IN framing a responsible government for the United States it is desirable that as few changes as possible should be made in the existing constitutional system. There are several reasons for this. In the case of a new nation, brought into existence by war or by more or less violent revolution or by international agreement, there is no conclusive reason why the forms of the old government should not be completely abandoned if the people so choose, and entirely new forms substituted. This is particularly the case where abuses under the old system have been the direct incentive to revolution or war. But where revolution has not taken place and the form of the government is changed by peaceful means, the retention, so far as is practicable, of institutions or methods to which the nation has become accustomed is likely to help rather than hinder popular acceptance of the new scheme. It should go without saying, also, that any moral obligations which the old Constitution embodies should be regarded. The primary object of a change of government, in

other words, is to secure a government which will be better in principle and more effective in practice than the one which is discarded. Mere novelty in government is likely to prove a source of weakness rather than of strength, and in any case is not a virtue.

With this principle in mind, the form of a responsible government for the United States may now be outlined.

The Congress should consist as at present of two houses, the Senate and the House of Representatives. The propriety of preserving a Congress of two houses is not due to any real or supposed superiority of a two-house, or bicameral, system to a system with only one house, but to other and more weighty reasons. By Article V of the Constitution no State is to be deprived without its consent of its equal suffrage in the Senate. There is no reason to suppose that every State, if the question were submitted, would agree to surrender this constitutional privilege; and it would be immoral to cancel the guaranty of equal representation even if a large majority of the States were willing to give it up. As a matter of fact no State, probably, would consent to such a change. So long, too, as the States are regarded as politically equal, and are subjected to the same uniform treatment, held to the same obligations, and equally protected against discrimination, there is obvious propriety in continuing

their equal representation in the Senate. Their unequal representation in the House, on the other hand, rests upon the same reasons which prevailed when the Constitution was framed, namely, the obvious inequality of the States in size, population, wealth, and economic importance. So far as can be seen, such inequalities will always exist.

The election of Senators and Representatives should take place at the same time and for the same maximum period. The reasons which dictate the equal representation of the States in the Senate do not at all justify a longer or different term for Senators than for Representatives; nor is there any reason why the Senate should be regarded as a body superior in any way to the House. What the maximum term of office for Senators and Representatives should be is, of course, a debatable matter of opinion. Experience has shown, however, that a term of two years is too short to enable the average Representative to acquire the knowledge and experience which fit him for maximum usefulness as a representative of the people. On the other hand, a term of six years for a Senator would seem to be as much too long as a two-year term for a Representative is too short. It is suggested that the maximum term for the members of each house should be four years. Members should be eligible as now for reëlection. With an exception presently to be noted, they should as now be forbidden

to hold any other office of trust or profit under the United States or under any State during their term. A member of either house who becomes a candidate for any elective office, Federal or State, should be required to resign his seat. There is an obvious impropriety in holding on to one elective office while seeking popular support for another.

Since, under a responsible government, the control of policy would be taken out of the hands of the President and given to Congress, it is desirable that the election of Senators and Representatives every four years, when the Congress lives out its maximum period of existence, should receive the undivided attention of the people. On this account the term of office of the President ought not regularly to coincide with the maximum term of Congress. A longer term than four years—five, six or seven years, with or without eligibility for reëlection—has been many times proposed by writers on American government or in resolutions presented in the Senate or the House. It is inevitable, of course, that whatever the length of the term the election of the President and the election of members of Congress would sometimes fall in the same year. It is suggested that the term of the President should be fixed at five years, and that the President should continue as now to be eligible for reëlection. A five-year term would seem to allow the people to express their opinion at the polls with

reasonable frequency, at the same time that presidential and congressional elections would regularly coincide only once in twenty years. In actual practice they would probably coincide only at longer and irregular intervals.

Following the choice of a new Congress, whether at the expiration of the regular four-year term or in consequence of a dissolution of Congress before the four-year term had expired, some member of Congress should be requested by the President to form a Cabinet. Whether the member so requested should be a member of the Senate or a member of the House is immaterial, since the support for any policy must come from the two houses jointly. If it so happens that any one party is in a majority in both houses, the member designated by the President to form a Cabinet and act as its head must of course be a member of that party and acceptable to its members in Congress; otherwise the Cabinet will be rejected by the houses at its first appearance. If no party commands a majority in both houses, the member designated would presumably be taken from the party having the largest representation in the chambers. In that case, however, he must secure the support of one or more of the lesser party groups, sufficient to give him the support of a majority. If the member designated as prospective head of the Cabinet is unable to secure the assurance of support from a majority in the

two houses, another member would have to be designated; while if, after repeated trials, all those whom the President has designated fail, the only alternative is a new election.

The persons chosen by the designated head of the Cabinet—who for convenience may henceforth be referred to as the Premier—to form the Cabinet should correspond, in the duties expected of them, to the present so-called Cabinet officers or heads of departments, together with such other secretaries or department heads as may from time to time be designated by law. The Premier himself should hold one of the offices. A majority of the Cabinet should always be chosen from the membership of the Senate or the House, but a minority may properly be selected from persons not members of either of those bodies. In the latter case the minority members chosen should, once the Cabinet is accepted by Congress, be given seats in the House of Representatives, with the privilege of voting but without the duty of serving on committees. They could not be given votes in the Senate because that would destroy the equal representation of the States in the Senate which the Constitution guarantees. The privilege of voting in the House, on the other hand, would not materially affect the proportional influence of the States in that body, since the total number of Cabinet votes so added would in any case be small.

Once the Cabinet has been formed, it should present itself in Congress at the opening of the session with a statement of the policy which it proposes to follow. The statement should of course be subject to unrestricted debate, and the Cabinet should have the right of accepting or rejecting any amendments to the statement proposed or voted in either house. An acceptance of the programme by a majority vote of each house should carry with it the acceptance of the Cabinet as constituted. Thereafter, so long as it continued in office, the Cabinet should direct both the legislative and the executive policy of the government.

When any member of the Cabinet ceased to command the support of the majority in Congress he should be expected to resign, since his retention in office under such circumstances would imperil the Cabinet itself. Resignation or even dismissal, however, should not vacate the member's seat in the Senate or House if he is an elected member of either of those bodies. Such a Cabinet officer should be regarded as holding a double mandate, one from the people and one from the majority in Congress; and the withdrawal of the latter mandate could not properly void the former.

Whenever the Cabinet, as the result of an adverse vote in both houses of Congress, was seen to have lost the support of its majority, it should place its resignation in the hands of the President. If

the President is of the opinion that another Cabinet can be formed which will receive the support of Congress, he should be required to take the steps which have already been indicated to insure its formation. If, on the other hand, he is convinced that a reconstruction of the Cabinet is impracticable, or if the Cabinet in resigning has announced its intention of appealing to the people, it should be the duty of the President to dissolve Congress and order a new election. The right of the President to act at his discretion should be carefully preserved save only where the Cabinet itself, in resigning, has invited a verdict of the people.

The detailed changes in the Constitution which would be necessary in order to put the system which has just been outlined into operation have now to be examined.

CHAPTER IX

THE NEW PRESIDENCY

THE powers and duties of the President are mainly set forth in Article II of the Constitution, which is entirely devoted to that subject. The provisions relating to the veto power are found in Article I, Section 7, and those relating to impeachment in Article I, Section 3. The original provisions of Article II governing the choice of the President were replaced in 1804 by the provisions of the Twelfth Amendment; while the Fourteenth Amendment laid certain restrictions upon the choice of presidential electors, and made it possible to impose a penalty upon States in which the right to vote for the electors was in any way interfered with. There are no other direct references to the presidency in the Constitution.

To what extent would the adoption of a responsible government such as has been outlined in the previous chapter render changes in any of these provisions necessary or desirable?

1. *Qualifications.* The Constitution provides that "no person except a natural born citizen, or a

citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

The provision regarding "a citizen of the United States at the time of the adoption of this Constitution" is, of course, obsolete. The fixing of an age limit of thirty-five years, while in itself serving no substantive purpose beyond that of insuring a certain degree of maturity in the incumbent, would seem to be as reasonable as would the fixing of any other period of life beyond the age of twenty-one; and the specification of "fourteen years a resident within the United States" appears to have had no other important purpose than to supplement or enforce the thirty-five years limitation by bridging with arithmetical exactness the interval between the age of majority and thirty-five. Residence within the United States apparently means legal residence, not actual or continuous personal presence during the whole of the period named.

The restriction of the presidency to natural born citizens, on the other hand, may well be reconsidered. Since, by the Fourteenth Amendment, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States"; and since by the same Amend-

ment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," the wisdom of continuing in the case of the presidency a discrimination against naturalized citizens which is not found in any other part of the Constitution may properly be doubted. Nationality of birth, if not by this time properly to be regarded as merely an incident of life, at least creates no certain presumption of fitness for public office. In a country which, like the United States, has received and is likely to receive large numbers of the foreign born, and which for generations has owed much of its prosperity to the labor and the devotion of its naturalized citizens, discrimination of any sort in favor of the native born becomes more and more invidious. It becomes grotesque when one remembers that the Negro, who within the memory of persons still living was a slave bought and sold as a chattel, is to-day constitutionally eligible for the presidency while white persons who happen to have been born in a foreign country are not.

The removal of the restriction which the Constitution now imposes would be a proper recognition of the equal rights of all citizens, whether native or foreign born, which the Constitution now decrees in all other respects. It would operate to diminish the racial and nationalistic antagonisms which still unhappily exist in spite of a common allegiance and common obligations. It would help to further a

genuine internationalism of spirit such as the world is struggling hard to attain. It would give practical application to the doctrine of the Declaration of Independence "that all men are created equal."

On the other hand, there would be no impropriety in requiring of a foreign born citizen who offered himself for the presidency a somewhat longer period of residence in the United States than the five years now prescribed for naturalization. Until a person of foreign birth is naturalized, even if he has declared his intention to become a citizen, most forms of political activity except, in some States, voting are denied to him. If experience of public affairs is in any case a desirable qualification for holding office, such qualification ought by all means to be expected of the President of the United States, and the citizen who aspires to that high office should have the opportunity of meeting the requirement. It is suggested that a five-year period of residence following naturalization would meet all the conditions of the situation.

2. *Election.* Little time need be spent in criticizing the method which the Constitution provides for choosing the President. The choice of presidential electors who in turn choose the President is a hopelessly antiquated device. It would be such even if the electors exercised a real discrimination between candidates, which they have not done for more than a hundred years, instead of

automatically registering the decisions of the political parties which they represent. The fact, too, that successful candidates have repeatedly been elected by a large majority of the electoral vote but with a minority of the popular vote, as may at any time happen when more than two parties are in the field, shows also how effectively the system can be used, under partisan manipulation, to defeat the popular will. The system is also a serious impediment to the work of minority parties and puts a premium upon party regularity. The day of secondary elections has long since passed so far as the support of public opinion is concerned, and the President of the United States should now be chosen by direct popular vote. If the successful candidate is then the choice of a plurality and not of a majority, it will be because public opinion itself is divided and not because an outgrown and mischievous electoral system has balked the intention of the voters.

The substitution of a direct popular vote for the vote of presidential electors would not necessitate any substantial change in the method which the Twelfth Amendment now prescribes for certifying and counting the vote and settling a disputed election. The voters would still vote separately for President and Vice-President; the results of the vote would be transmitted to Congress by designated officials of the States instead of by the presidential electors; and the returns would be opened and ex-

amined in the presence of the two houses and the result declared. At present, in case of the failure of any candidate for President to obtain a majority of the electoral votes, the House of Representatives is required to choose a President from among the three candidates having, respectively, the highest number of votes; while in the case of the Vice-President the choice devolves upon the Senate, which must choose one of the two candidates highest on the list. The method indicated is clearly as applicable to elections based upon a popular vote as it is to those conducted under the present system.

3. *Powers and Duties.* (a) *Military powers.* By the Constitution the President is made "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." As the employment of military or naval force, whether in foreign war or for the suppression of domestic insurrection, is not only inseparable from the policy of the Premier and Cabinet but also an act for which Congress and the public are certain to hold them peculiarly responsible, the supreme direction of the land, naval, and air forces should unquestionably devolve upon the Cabinet. It appears not to have been regarded as the intention of the framers of the Constitution that the President should take the field in person, and accordingly the title of commander-in-chief implies in fact only the

right to direct military and naval policy; and the determination of policy is the function of the Cabinet. With this change accomplished, the political party or parties in Congress which formed the support of the Cabinet would become responsible for war and its conduct, instead of the responsibility being left, as at present, to a President over whose acts neither Congress nor the people are able to exercise control.

(b) *Control of executive departments.* The right to require opinions, either orally or in writing, of heads of departments directly would of course disappear with the transformation of such bureaus into Cabinet departments. The President should, however, be entitled to information at all times, both through routine reports and in response to requests, regarding the work and policies of the Cabinet, but his requests for information should be addressed to the Premier rather than to Cabinet officers individually.

(c) *Pardons.* The President now has power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." While the grant of pardons or reprieves might conceivably involve a conflict with the Cabinet, it may probably be assumed that the President, having nothing to gain and perhaps influence to lose by acting in opposition to the Cabinet, would exercise his power in consultation with the Cabinet as he

does at present in consultation with the heads of the executive departments concerned. The power, accordingly, is one which he might properly retain. The fact that the President was known to favor the grant of a pardon in a given case or class of cases, while the Cabinet was opposed, could hardly be without a moderating influence upon the latter body.

(d) *Treaties.* The constitutional provision on this subject reads as follows: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The language is not clear. Perhaps it was the original intention that the President should receive the approving votes of two-thirds of the Senate before negotiating a treaty, and that the approval of a similar two-thirds when the vote upon ratification was taken should be sufficient to ratify the treaty. In practice, however, the President has usually negotiated treaties with little or no reference to the opinion of the Senate and without consulting it, but a vote of two-thirds of the whole number of Senators has been necessary for ratification.

The whole constitutional question of treaties, including international agreements or understandings which are not usually embodied in formal treaties, needs clarifying, particularly in view of the controversies which developed over the Treaty of Versailles. Something more will be said on the subject

in a later chapter on the powers and duties of Congress. It will be sufficient to point out here that the negotiation of a treaty is again an act of policy with which the Cabinet and not the President should be concerned.

(e) *Appointments and removals.* If the President, once a responsible government is established, is to cease to be responsible for policy, there is no reason why he should continue to appoint Federal officials of any class. The desirability of incorporating in a new Constitution provisions designed to destroy patronage and favoritism and to establish the Federal civil service on a merit basis can hardly need argument in its favor. Subject to such provisions, the large powers of appointment and dismissal (the latter an inference from the former) which are accorded to the President under the Constitution should be transferred to the Premier and Cabinet. Since the Cabinet is responsible, the approval of appointments by the Senate as at present would become unnecessary. It would also be unnecessary to provide for recess appointments, since the Cabinet would always be in a position to act whether Congress were in session or not.

(f) *Messages.* The annual and special messages of the President have long since ceased to have any particular value as sources of "information of the state of the Union," and are important only as indications of policy. Their place would properly be

taken by oral or written statements made by the Premier to Congress at the beginning of a session or from time to time. Naturally, it would cease to be the right of the President to recommend legislation once a Cabinet became responsible for policy.

(g) *Summoning Congress and adjourning it.* The Constitution provides that the President "may, on extraordinary occasions, convene both houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper." A disagreement between the houses regarding the time of adjournment would not be likely to occur under a responsible Cabinet, save in the rare event of a complete temporary breakdown of party organization and control. In such a remote contingency the Cabinet would have no recourse save to dissolve Congress and order a new election, in which case there would be no Congress in existence during the interval for the President to summon. Practically, then, the right to summon Congress "on extraordinary occasions" could be exercised only during a recess. Since, however, "extraordinary occasions," one of the most serious of which would be the death or resignation of a Premier, may as well occur during a recess as at any other time, the right of the President to summon Congress in special session, and to adjourn it to a designated date in case the two houses cannot agree upon adjournment, is a valuable one to retain.

(h) *Reception of foreign representatives.* This is in part a formal matter, but it is also politically important because it implies the friendly recognition of the government from which the representative is accredited. In view of the fact, however, that diplomatic representatives are now rarely appointed without consulting in advance the government to which they are to be sent, the formal duty of receiving the representative may with propriety continue to be performed by the President, since the Cabinet would already have had an opportunity to express its disapproval of the proposed appointment had it wished to do so.

(i) *Execution of laws.* The Constitution provides that the President "shall take care that the laws be faithfully executed." In a responsible government the execution of the laws is logically a function of the Cabinet. The transition from the present condition of things would not be difficult, since in practice most of the laws of Congress are now put into operation as a matter of course by the executive departments which naturally are concerned with them, and with little direction from the President save when serious controversies arise.

(j) *Commissioning of Federal officers.* All Federal officers are now commissioned by the President, whether appointed by him or not. The duty, which is chiefly clerical, is a natural accompaniment of the right to appoint. With the transfer of the appointing power to the Cabinet, the duty of is-

suing commissions would be transferred also.

(k) *The veto power.* The veto power is one of the most important powers given by the Constitution to the President and one, too, in regard to which there has been controversy since the establishment of the present Federal system. The right to withhold presidential approval from a bill is associated, in the Constitution, with the requirement that all bills which have passed the Senate and the House shall be presented to the President before they become law. The date of the signature of the President is the date at which the law becomes operative, unless the bill itself prescribes a different date. The duty of signing bills and thereby putting laws into effect may properly continue to be performed by the President under a responsible government. Whether or not the President should continue to possess the veto power, however, is a different question.

The practical effect of a veto, of course, if it is sustained, is to defeat for the moment the work of Congress. If there is sufficient support for the measure to give the two-thirds majority in each house which is needed to pass the bill over the veto, the defeat is only temporary; but if, as has usually happened, a two-thirds majority cannot be obtained, the defeat is final. It is a case of the opinion and the will of the President against the opinion and the will of Congress, and experience shows that, where

the issue is joined, the President usually prevails. The most important work of a congressional session may, accordingly, go for naught because the President has refused to sign the bills which Congress has laboriously framed.

The argument which is usually most relied upon in defending the veto power is that the veto acts as a desirable check upon Congress. Congress, it is urged, may be hasty or careless; it may not consider all the facts in the case; it may be moved by sectional or class influences; and it is almost always partisan. The President, holding a mandate from the whole people and not from any section or class, and being in a way responsible for all the work of government, is likely to see the interest of the country in a clearer light; and hence is able, by resort to the veto, to protect the country against legislation which, however carefully it may have been framed by Congress, would ultimately prove to have been unwise even if not disastrous. The veto power is thus a salutary restraint upon Congress, warning it constantly to do its work well; and at the same time a protection to the people, shielding them from the inexperience, the restricted vision, and the partisan bias of their representatives.

While it is true that the veto or, what is much more common, the fear of it is likely to be a strong restraining influence with Congress, the argument as a whole hardly bears close scrutiny when viewed

as a matter of constitutional procedure. To begin with, the President is no more directly a representative of the whole people than is Congress. In the form of his election, indeed, he is less so; for while Senators and Representatives are chosen by direct popular vote, the President is not and cannot be voted for directly, but is chosen, as has already been pointed out, under an antiquated scheme of secondary election in which an overwhelming majority of the electoral vote may mean only a minority of the popular vote. Once elected, the President is indeed the President of the whole people, but there is no reason whatever for regarding him as the people's choice in any higher sense than the members of Congress may properly be so regarded. As a matter of fact, Senators and Representatives have usually regarded themselves as representatives of the whole people as well as representatives of their particular States or constituencies. "We are all servants of the same master, the people," said Webster in his famous debate with Hayne.

Nor can it properly be claimed that the President, by virtue of any power or opportunity incident to his office, is presumptively a better judge of the needs of the country than Congress. On general principles, indeed, he should be a less competent judge. Most of the Presidents, down to the time of their nomination, have had no more practical acquaintance with national affairs than was pos-

sessed by many members of Congress, and some of them have had distinctly less. Few of them have ever travelled widely in the United States prior to their election. Outside of diplomatic matters, which by custom are usually secret where they ought to be public, the President has access to no sources of information regarding the needs of the country or the state of public opinion which are not equally open to Senators and Representatives. If there is wisdom in numbers, in variety of experience, and in diversified opportunities for observation, it is the Congress and not the President that is best qualified to test the public pulse and read the mind of the country. The notion that the judgment of the President as to what is best for the country is sounder than the judgment of Congress may be dismissed as one of the political theories which tradition has built up about the presidency, but which has very slight foundation in fact.

Moreover, it certainly cannot be maintained that the President, in using the veto power, acts without bias. It is because he believes his own opinion to be superior to that of Congress that he vetoes a bill. The veto is not an educational instrument, for it commonly changes no one's views. Rather is it a device for enabling the President to have his way, a lash held over Congress to compel it to conform. As such it is valuable so long as the President is expected to control policy. If the Presi-

dent is really to be the director of national affairs, he is entitled to the means which will make his power effective. Once, however, the control of policy is transferred to a responsible Cabinet resting upon the support of a majority in Congress, the reason for retaining a veto power at all disappears. No Cabinet could be held responsible if the President might at any time intervene and check its plans, and no Cabinet would think of using the veto upon itself.

The veto, in short, is an incident of the existing presidential system. It is a relic of the monarchical ideas which were prominent in the minds of Americans as well as of Englishmen at the time the Constitution was framed. But it has no place in a system of responsible government, as the experience of England shows, and it should be abandoned altogether when such a system is established.

4. *Presidential Succession.* The Constitution provides that "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected."

No President has ever been removed from office and none has ever resigned. Five Presidents have died in office, three of them as a result of assassination, and in each case the Vice-President has automatically become President. There is no provision for the choice of another Vice-President when the one who is in office succeeds to the presidency. To provide for a vacancy which might occur through the death, removal, resignation, or inability of a President when there was no Vice-President to succeed, Congress has by law devolved the succession in such case upon certain members of the so-called Cabinet in order, beginning with the Secretary of State, provided such members are also constitutionally eligible.

The office of Vice-President, while obviously a necessary and proper provision for a contingency, has always been regarded as unimportant. The only duty which the Constitution assigns to the Vice-President so long as there is a President is that of presiding over the Senate; and as president of the Senate he has no vote except in case of a tie. With the transfer of political power under a responsible form of government from the President to the Cabinet, the vice-presidential office becomes if possible less important than ever.

Once a responsible government under a Premier and Cabinet is established, no sound reason is apparent why, when a vacancy occurs in the office of

President before the expiration of the five-year term which has been proposed, any person should be designated to fill out the unexpired portion of the term. The President whom the people chose is no longer in office, and the proper procedure is a new election for a full term. A fixed series of five-year terms, like the present series of four-year terms, has only the arithmetical interest of something easy to remember, and is of no political importance. The new President, nominated and elected by the people in the regular way, would be as much entitled to a five-year term as was his predecessor.

It is proposed, accordingly, that in the event of the death, resignation, or removal of the President provision should be made for holding a new election. The date of such an election need not be more distant than sixty days from the occurrence of the vacancy. The President so elected should be chosen for the full term of five years, and should take office immediately upon the ascertainment of the result of the vote. Congress should be required to make provision for the temporary performance of the duties of the presidential office during the interval, and also for the prompt determination of the result of the election.

The treatment of inability is more complicated. The Constitution itself is silent as to what constitutes inability or as to how inability shall be determined. On the two occasions on which the question has

been widely discussed—the protracted inability of President Garfield between the assault upon him and his death, and the long-continued illness of President Wilson—no action was taken. It is extremely undesirable that so serious a defect in the Constitution should go unremedied. It is suggested that the Cabinet should be authorized and required, whenever the alleged inability of the President is brought to their notice by members of either house of Congress, to determine whether or not a condition of inability exists. A commission made up of members of Congress and of the Federal courts, empowered to examine witnesses and to command medical or other advice, would insure a proper basis for the Cabinet's decision. If the fact of inability is made clear, the arrangements which should be made by law for the temporary discharge of the presidential duties should at once become operative for the period during which the inability continued.

From what has been said under this head it will appear that the office of Vice-President would no longer be necessary, and should be discontinued.

5. *Other provisions.* The change from irresponsible to responsible government would appear to involve no necessary changes in the constitutional provisions regarding the impeachment of the President, or his oath of office, or his compensation. The obligation to see that the laws are faithfully executed is not a part of the oath of office.

Passing in review the changes which have been discussed in this and the preceding chapters, it will probably be objected that the presidency has been stripped of practically all of its important functions, and that the office will be merely a formal one and its incumbent a figure-head. In a sense the objection is sound. The President would no longer control policy, and the duties which remained to him would naturally be of minor importance. It should be remembered, however, that the presidency as established by the Constitution and developed by usage is a composite office. It combines in one person the executive duties which in most countries are performed by an elected or hereditary head of the state, and the political duties which in a responsible government are performed by a prime minister. The union of those two classes of functions in one person has resulted in the subordination of Congress and the establishment of presidential autocracy. With such enormous powers as now center in the presidency lodged in the hands of one official who for all practical purposes is irresponsible, no people can be free. Arbitrary rule follows as a matter of course, and arbitrary rule is a sure incitement to revolution.

The strength or weakness of the new presidency would depend a good deal upon the incumbent of the presidential office. The independent powers of the office would not be so great that a weak

President, if the people were foolish enough to elect one, could do much harm. A strong man, on the other hand, could make the office one of national influence and wide social importance. Most thinking people realize the usefulness of ceremonial in public affairs, and take pleasure in knowing that the nation will be represented with dignity and effectiveness on state occasions. Even monarchies, as a rule, have been inexpensive on the ceremonial side at the price which the people paid for them; their evils have usually lain in other directions. Moreover, as the one official for whom every citizen of the country has an opportunity to vote, the new President could, if he chose, exert a wide influence as the spokesman of the people. While he could not control policy he might do something to modify it, particularly on occasions when controversy was acute and party feeling ran high. The introduction into our national politics of a moderating influence, wielded by a head of the nation who was not a party leader and who could raise his voice above the din, would be a gain for which the present constitutional system affords no opportunity.

CHAPTER X

THE NEW CONGRESS

WITH the exception of certain changes necessitated by a modification of the present voting system, which will be discussed later, the introduction of responsible government in the United States would involve few changes of great importance in the statement of the powers and duties of Congress which the Constitution now contains. The change of the term of office of both Senators and Representatives to a period not exceeding four years has already been mentioned. The House would continue to be presided over by a speaker who, however, would become a moderative instead of a partisan chief; while the Senate, there being no longer a Vice-President, would choose a presiding officer from among its own members as it now chooses a president *pro tempore*. Each house would continue to regulate its own procedure, discipline its members, and transact business through committees. Bills and resolutions would take their usual course, except that there would be no veto. The long list of powers which by Article I, Section 8, of the Consti-

tution are given to Congress, together with other powers and prohibitions which are set forth elsewhere in the Constitution, would continue to govern the action of the national legislature. In other words, it is not because Congress possesses limited or improper powers, but because its powers are subordinated to a President whom neither Congress nor the people can control, that a revision of the Constitution is necessary.

Certain of the existing provisions, on the other hand, are of such a nature as to suggest desirable modifications.

1. *Age of Senators.* The prescribed minimum age of Representatives is now twenty-five years, that of Senators thirty years. In addition, a Representative must have been a resident of the United States for at least seven years, and a Senator a resident for at least nine years. Since Senators are now elected by direct popular vote, and are on principle no more entitled to distinction as representatives of the States than members of the House are as representatives of the people; and since it is proposed that the term of office of Senators should be made the same—four years—as that of Representatives, no useful purpose would be served by continuing to require a higher age limit in the one case than in the other. An uniform age limit of twenty-five years for the members of each house would seem to be an equitable arrangement.

2. *Residence.* As Senators represent the States as constituent members of the Union, in addition to representing the people, there is an obvious propriety in requiring Senators to be, as at present, inhabitants of the State from which they are chosen. They cannot well be required to inhabit any particular part of the State because a State is not districted for Senators, and Senators are everywhere elected on a general ticket.

The Constitution requires that Representatives also shall be inhabitants of the State in which they are elected, but custom has added the requirement that they shall also live in the district which returns them. The custom has often been criticized, and the objections to it are sound. The only reason for dividing a State into so-called congressional districts—a division, it should be noted, which is not required by the Constitution—appears to be the desire to give all parts of the State their particular spokesmen in the House. The division is a purely arbitrary one, however. The number of districts is entirely dependent upon the number of Representatives to which the State is entitled on the basis of the decennial census of population; the boundaries of the district rarely conform to any natural grouping or distribution of population and are subject to change every ten years; while the function of the district as a political subdivision of the State begins and ends with the choice of a Representative.

It is hard to see why the people of a congressional district should not be allowed to choose whomsoever they will among the inhabitants of the State to represent them, whether the person chosen lives in the district or not. Since the only object is representation, there is no good reason for restricting the choice to persons who inhabit an essentially formal voting area. It may well be that the people of a given district would prefer to be represented by a person whose residence is elsewhere in the State; if so, they should be allowed to nominate and elect him. It is the people who are to be satisfied. Moreover, once the people are free to elect any qualified inhabitant of the State, whether he lives in the district or not, the temptation which now exists, and which has often been yielded to, to draw the district lines in such a way as to make a district strongly of one party complexion or another would largely or wholly disappear. It would no longer be necessary for an acceptable Representative to face defeat at a new election because a State legislature had gerrymandered his former district so as to change its party character; for he might then, if he chose, offer himself as a candidate in another district. There can be little question but that the removal of the present customary requirement of residence in the district would also materially improve the quality of popular representation in the house.

3. *Secret Journals.* The Constitution requires

that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." The House of Representatives has rarely held secret sessions, and its journal is regularly published. The Senate, while transacting most of its business openly, has as a rule considered nominations for office and diplomatic business in "executive" or secret session, and has sometimes delayed for considerable periods the publication of its executive or secret journals. The recent experience of the United States with "secret diplomacy" has, it may be hoped, effectually condemned that method of procedure in foreign affairs whether the condemnation is taken to heart in practice or not; while as for secrecy in any other phase of public business, that has never been defensible. The Constitution should be so amended as to prohibit secret sessions of either house and to require the prompt publication of the full record of legislative proceedings.

4. *Treaties.* At present treaties are negotiated and signed under the authority of the President and are ratified by the Senate. They go into effect upon the issuance of a proclamation by the President following the exchange of ratifications by the countries concerned. The House of Representatives is not a party to the making of treaties, but is nevertheless under a moral obligation to initiate or

concur in any legislation which may be needed to carry out the provisions of a treaty.

Since, however, under a responsible government such as has been proposed, the negotiation of treaties would devolve upon the Premier and Cabinet, who represent the majority of both houses of Congress, the approval of both houses should be made necessary for ratification. The House of Representatives, which directly represents the people, is at least as much concerned with a treaty as is the Senate, which also represents the States; and it would be an indefensible anomaly to continue the power of ratification as a Senate prerogative when the support of both houses is necessary for the maintenance of the Cabinet in office. The fact that treaties often involve some expenditure of money, and that all bills for raising revenue must originate in the House, is further reason for giving the House a voice in ratification.

It has already been pointed out that the procedure of Congress in the matter of treaties should be public. To this should be added the constitutional requirement that a request from either house for papers or other information regarding treaty negotiations should be mandatory upon the Cabinet. Under the present system of presidential control the right of the House of Representatives to call for papers relating to diplomatic matters is not recognized, and the President may refuse to

transmit such papers even when they are called for by the Senate. Even the text of a treaty for which the approval of the Senate is demanded may, in the discretion of the President, be withheld from publication. The most notorious example of this latter usurpation of power is the withholding of the text of the Treaty of Versailles by President Wilson. For such constitutional support of secret diplomacy there is no defence, and it should not be allowed to exist in an otherwise well-ordered government.

5. *War and Peace.* Under the present constitutional arrangement Congress alone can declare war, and it has usually been held that the President alone can negotiate a peace. A defensive war, attended by actual or threatened invasion of the country, would of course not need a formal declaration. The President can, however, without any action by Congress, bring about such a state of affairs that war with a foreign country actually exists, as was done by President Polk in 1845 in the war with Mexico. Once war is formally declared, Congress cannot direct how it shall be conducted or when it shall be ended; those are the prerogatives of the President as commander-in-chief. It is true that the conclusion of peace does not rest exclusively with the President, since a treaty such as ordinarily ends a war requires the ratification of the Senate; and a refusal to ratify, as in the case of the Treaty of

Versailles, would leave the country still technically, if not actually, at war. The actual control which the Senate can exercise on bringing about peace is very small, however, because the President must first negotiate a treaty before the Senate can act upon it.

The curious situation under which Congress, which alone can declare war, is without power to end a war which it has authorized has of late been sharply criticized. Eminent constitutional authorities have urged that Congress might, by joint resolution, declare a war at an end, and thus compel the President to recognize peace as restored and to negotiate a treaty for the settlement of any questions that needed to be settled. Aside from the fact that such action on the part of Congress would violate precedent and that a presidential veto might have to be reckoned with, any attempt on the part of Congress to end a war against the wishes of the President would almost certainly entail a violent struggle between Congress and the President which would be as partisan and unseemly as it would be harmful to the welfare and the interests of the nation. Only a desperate situation as a rule justifies a desperate remedy. Such a situation was, however, presented in a novel form at the close of the late European war, when the refusal of the Senate to ratify the Treaty of Versailles without changes which President Wilson refused to accept

left the United States for many months technically at war with Germany, and made possible the continuance of a large amount of odious war legislation,

Yet the distribution of power over war and peace which the Constitution ordains is nevertheless the proper one. The legislature should declare war, the executive should conduct the war and bring it to an end. What causes trouble is the fact that the President is not a responsible executive. The vast powers which a state of war involves are placed in his hands, but his use of them is subject to little restraint. Neither Congress nor the people have any effective way of calling him to account. Under a system of responsible government, on the other hand, Congress alone would be to blame if any such opposition of policies continued. The Congress would still declare war and the Premier and Cabinet would conduct its operations, but the majority in Congress would have it in its power to call the Premier and the Cabinet to book at any time. If the majority in Congress desired peace and the Cabinet did not, or if the only terms of peace which the Cabinet favored were such as Congress opposed, the Cabinet could be turned out of office by a vote of want of confidence and a new Cabinet installed which would do what Congress wished. The control of war and peace would always remain in the hands of the representatives of the people if those representatives were faithful to their trust. If anything were

needed to show the necessity of giving to the people and their immediate representatives the control of war and peace, it is the experience of the world since November, 1918.

6. *Revenue Bills.* Article I, Section 7 of the Constitution prescribes that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." This requirement has been honored in the breach as well as in the observance. While bills for raising revenue as a rule originate in the House, the Senate has not hesitated to frame tariff bills of its own, or to construct such elaborate "amendments" of House bills as to constitute, in everything except name, new measures. More than once the opposition of the Senate, based upon a well recognized determination on the part of that body to have its own financial ideas prevail, has forced a radical modification of the House programme. In addition, the Senate has felt itself free to propose bills appropriating money, which of course exert pressure upon the House to provide for raising the money called for.

Reference will be made later to the necessity of providing a Federal budget system. Subject to the requirements of such a system, it will be sufficient to point out here that the right to originate not only bills for raising revenue, but also bills appropriating money, should be vested in the House

of Representatives; and that the right of the Senate to amend such bills should be restricted to amendments reducing the amounts proposed to be raised or appropriated. It should not be within the power of the Senate to propose any increase of revenue or expenditure, or any sources of revenue or objects of expenditure not advocated in the first instance by the House. Federal taxes are paid by the people, not by the States as political organizations, and the branch of Congress which most directly represents the people is the one properly to be intrusted with control of the purse.

CHAPTER XI

WIDENING THE POWERS OF CONGRESS

It has generally been regarded as one of the great virtues of the American Constitution that the powers which it granted to the President, to Congress, or to the courts were in most instances phrased in broad and general terms, and thus could be applied, without doing violence to their obvious meaning, to changing social conditions. The grant to Congress for example, of the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," has proved sufficient, it has been pointed out, for the days of the stage-coach and the days of the railway, for those of the sailing vessel and those of the steamship. But for this adaptability to changing circumstances the Constitution would have been much more frequently amended than it has been, and the amendments would certainly have taken a wider range.

Not even the American Constitution, however, is perfect. The lapse of time, the experience acquired in working the constitutional machinery,

strained and inconsistent interpretations by the courts and by the executive, and the rise of new issues or the development of new social conditions which the framers of the Constitution could by no possibility have foreseen, have combined to reveal certain important defects or limitations in the Constitution which should now be remedied. Some of those defects and limitations which concern the Constitution itself have already been considered. Those which concern Congress, especially as that body would be under a responsible government, remain to be discussed.

1. *Corporations.* The Constitution gives to Congress no direct power to create corporations. The famous controversy in 1791, however, over the incorporation of the first Bank of the United States, committed Congress to the theory that a Federal corporation might properly be created as a means to the accomplishment of some end for which the Constitution provided—for instance, to collect revenue or manage the Federal debt. It was also clear that corporations could be regulated if they engaged in interstate or foreign commerce, and might be formed as a means of regulating such commerce.

As a matter of fact this implied or resulting power, to use a legal phrase, has been increasingly resorted to for the minute regulation of corporations and in a lesser degree for their creation. The absence of any clear constitutional provision on

the subject, however, has embarrassed the Federal courts and led to more than one decision of doubtful propriety; and it has also proved embarrassing to the States, all of which have sought to control the activities of corporations within their own borders. Such controversies are inevitable wherever two governments, each claiming a constitutional right to act, undertake to legislate on the same subject.

The nature of modern business, carried on as it is very largely by corporations and operating without regard to State or even national lines, stamps the corporation as obviously a subject of Federal control. There should be added to the Constitution a provision empowering Congress to create corporations, to regulate their affairs, to prevent interference with their operations by the States, and to dissolve them by appropriate legal process. New corporations which propose to engage in interstate or foreign business should be required to incorporate under Federal law.

2. *Immigration.* The only provision of the Constitution relating to immigration, except an obsolete provision referring to slaves, is that which empowers Congress "to establish an uniform rule of naturalization." Commerce, however, has been held by the courts to include the movement of persons as well as the movement of property, so that by implication the commerce clause authorizes the regulation of immigration. There is need of an amendment giving

to Congress exclusive control of immigration as well as of naturalization, and specifically excluding the States from any share in such control. The amendment should be so framed as also to make the Federal Government responsible for any interference, whether by a State or by private persons, with the legal rights or personal safety of aliens in the United States. Hostile legislation against aliens, such as has been proposed or enacted in California regarding the Japanese, and race riots against foreigners, such as have occurred in Illinois, Louisiana, and other States, would be brought by such an amendment directly under the control of the Federal authorities. That a State, either by legislation or by threats or by its own misconduct or the misconduct of its citizens, should be allowed to involve the Federal government in controversies with foreign powers or threaten the sanctity of treaties, is an anomaly for which there can be no excuse.

3. *Education.* Without any other constitutional warrant than the blanket grant of authority to use the proceeds of Federal taxes to provide for the "general welfare" of the United States, Congress has for years expended large and increasing sums for educational purposes. It has also given vast quantities of land to the States as the basis of a school fund, and further quantities of land in aid of agricultural education. Its educational activities include the creation of a Bureau of Education, the conduct of

scientific investigations, the collection of educational statistics, the distribution of literature, the subsidizing of agricultural education, and the classification of private and State universities and colleges for the purpose of estimating the relative worth of their degrees.

The problem of dealing effectively with education as a Federal matter is complicated not only by the lack of constitutional authority, but also by the fact that the control of education has always been assumed to be primarily a State affair. The appalling indifference of many of the States, however, especially in the South, to even the elementary education of their people; the large number of illiterates, both children and adults, in most of the States; the special needs of great numbers of the foreign born who do not speak English; and the need of greater uniformity than exists at present in the requirements for such professional degrees, as for example those in law, medicine, or dentistry, as are closely related to the legal privilege or obligation of the holder, all point to the necessity of widening as well as clarifying the scope of Federal control. It is not the right of any one in this age of the world to remain ignorant, nor should it be a prerogative of a State to withhold from any of its inhabitants adequate facilities for remedying that condition.

It is in the interest of the whole people that an amendment of the Constitution should be made

which would empower Congress to appropriate money in aid of education, to prescribe a minimum requirement for schools of all grades in length of term, courses of study, and qualifications and compensation of teachers, to fix a minimum per capita sum to be raised annually by each State for educational purposes, and to distrain upon the property of citizens of the State in case the minimum per capita levy were not made. These proposed powers are great and are capable of political abuse, but nothing less comprehensive seems likely to meet the case of States in which public concern for education is lacking, or to combat the volume of illiteracy which still exists even in States whose educational systems are both expensive and elaborate.

4. *Marriage and Divorce.* Neither marriage nor divorce is at present within the scope of Federal legislation, both of these subjects being left to the States. The chaotic conditions which have come to prevail as the result of diverse State legislation are too well known to be recited here. The whole matter should be transferred to the control of Congress and State laws displaced. The legal status of a person as married or divorced should obviously be uniform throughout the United States, and there is no more reason why the State should concern itself with the subject than there is for concerning itself with naturalization.

5. *Budget.* The financial procedure of Congress

in regard to revenue and expenditure has always been open to serious criticism. Now that the financial operations of the government have reached huge proportions, the criticism has become widespread and outspoken. In practice, bills for raising revenue are usually framed by the Ways and Means Committee of the House of Representatives. Appropriations, on the other hand, are proposed without limit by heads of departments, by committees, and by individual members, and are usually passed upon and ultimately recommended either by the House Committee on Appropriations or by committees having charge in general of legislation relating to particular departments of government business. The Senate, while in terms not at liberty to originate revenue bills, has the power of amendment and of dissent; with the result that most important money bills go to a conference committee, which has the task of harmonizing the opposing views of the two houses.

No method could be more unscientific or unbusinesslike, or more certain to favor extravagance, carelessness, and political trading. Between the Committee of Ways and Means and the Committee on Appropriations there is no necessary coöperation or harmony of interest, nor is there any clear responsibility for a tax or an appropriation after legislation has been enacted. The desire of members to "do something for their district" has full

play, at the same time that there is no committee charged with the duty of viewing the financial needs of the country as a whole.

Under a responsible government, on the other hand, the financial operations of the government would become one of the chief responsibilities of the Cabinet; while in any well-ordered system of public finance receipts and expenditures should balance. The method of insuring both political responsibility and a proper balancing of accounts is the budget.

It should be the duty of the Secretary of the Treasury, who in this matter would of course act as the mouthpiece of the Cabinet, to lay before Congress at the beginning of each annual session an itemized statement of estimated receipts and expenditures for the ensuing fiscal year. If the estimated receipts exceed the estimated expenditures, the balance would be carried by the treasury as a provision against emergencies or, if the surplus were greater than a reasonable provision for contingencies demanded, it could be applied to the reduction of the debt or to the reduction of existing taxes, such as the income tax. If, on the contrary, the estimates showed a deficit, it would be the duty of the Secretary to suggest the new taxes or loans that would be necessary to meet the expenditures proposed.

The budget, representing as has been said the

financial policy of the Cabinet, should be considered as a whole, first by the House as directly representing the people, and afterwards by the Senate as representing also the States. The Cabinet should be at liberty to accept amendments or to reject them, bearing in mind that a refusal to accept an amendment may at any time be made the basis of a motion expressing a want of confidence in the Cabinet, and that the adoption of such a motion would force the Cabinet to resign. The amending power of the Senate should be limited to the reduction of the amounts voted by the House, but should not extend to the striking out of any item which the House has approved. If a Senate amendment is accepted by the Cabinet, the budget bill need not be referred back to the House. If the Cabinet declines to accept a Senate amendment, the bill would go to a conference committee for adjustment of the point at issue.

It is essential to the proper and effective working of a budget system that all proposals for raising revenue or appropriating money should originate with the Cabinet, and not with individual members of either house. The right of members to influence financial legislation is sufficiently guarded by the privilege of freely debating the budget and proposing changes while the bill is under discussion. Any supplementary financial legislation, accordingly, that was found to be necessary after the regular

budget bill had been passed should be brought forward by the Secretary of the Treasury in the same way that the budget was presented, and should follow the same procedure.

6. *Economic Control.* With the exception of the tariff, the banking and monetary systems, and the income tax, most of the control which the Federal government exercises over the economic life of the nation rests upon either the commerce clause of the Constitution, or upon the "general welfare" clause, or upon the so-called war powers. It is peculiarly unfortunate that to-day, when the industrial and business operations of the country are being subjected to Federal regulation in increasing measure, and when further steps of far-reaching importance in the same direction are everywhere being discussed, the only constitutional warrant for most of what is proposed should be found in strained interpretations of provisions which obviously were never intended to apply to economic conditions such as now prevail. Nothing illustrates better the antiquated character of the Constitution than the fact that such questions as child labor, the regulation of prices, the prevention and punishment of profiteering, the settlement of industrial disputes, and the nationalization of railways, mines, or other industries or natural resources must, if they are to be dealt with by the Federal government, be approached from some such remote standpoint as that

of an assumed transaction in interstate or foreign commerce, or else covered by some new and ingenious stretching of the "common defence and general welfare" clause.

There can be little question but that the thought of the American people has already come to favor Federal control and operation, if not in every case actual ownership, of railways, telegraphs, telephones mines, mineral and oil deposits, water powers, and forests; and that the control of numerous large businesses such as meat packing, cold storage, and the manufacture of munitions of war may soon be added to the list. It is not necessary to argue here the desirability or the danger of nationalizing industry. It is sufficient to note that the demand for nationalization is made on every hand, and soon will be, if it is not already, dominant in the economic and political thinking of the country.

The United States has tried State regulation of industry and private control of great national businesses, and both have broken down. It has tried national regulation and control under a Constitution which never contemplated any such thing, with the result that while certain pressing emergencies have been crudely met, the courts have floundered in their decisions, private interests have massed their powers in opposition, and the evils of an irresponsible government at Washington have been

made only the more apparent. It is time that economic chaos gave way to order under a Constitution framed for present needs.

The Constitution should be so amended as to permit the United States to acquire, or to control in all respects, as in the judgment of Congress from time to time may be deemed expedient, any industry or natural resource. Included in such control should be the power to regulate prices, wages, and conditions of service, production, and distribution. The nationalization of any industry, whether in whole or in part, would then become a question of national policy, subject to debate in Congress and in the country, under a Cabinet which was responsible. It would cease to be, as now, either a controverted question of legal authority or an act of executive usurpation. If the people desired to have an industry nationalized, the control of the government would be in their hands and they could bring the desired result about. If the majority in Congress desired to nationalize an industry regarding which the people had as yet expressed no opinion, they could appeal to the country to support them.

It should need no demonstration that the power to nationalize any industry in whole or in part would make it possible to end many of the controversies which are now constantly arising between the Federal government and the States over questions of jurisdiction. There is no apparent reason, for

example, why increases of passenger fares or of freight rates granted by Federal authority to railways should not be equally applicable throughout the country, whether the traffic be interstate or wholly within a State. The power which a State now has to regulate railway charges within its own borders is, in practice, only a power to discriminate in favor of its own inhabitants, thereby putting the State in opposition to the United States and enabling it to attach exceptions to a Federal regulation. It is not to the interest of good government or of economic welfare that such a power should be perpetuated. There would be no need to perpetuate it if the people were in a position to control the Federal government.

7. *Internal Improvements.* The term internal improvements was used during the first half of the nineteenth century to designate certain public undertakings, principally the construction of highways and the improvement of navigable rivers, within the States, for which appropriations of money or subscriptions to stock issues were made by Congress. There was always well-founded doubt regarding the constitutionality of such appropriations, and by 1840 they had practically ceased.

Appropriations for internal improvements have lately been revived in the form of grants by Congress in aid of the "good roads" movement. A Bureau of Good Roads has been organized in the

Department of Agriculture. There can be no question but that Federal appropriations for the construction or maintenance of highways, save where the highways are obviously interstate, are as unconstitutional now as they ever were; but there can also be little question that such use of Federal money is generally approved by public opinion. The growth of motor transport is giving to commerce a new facility of which account must be taken. Such being the case, the constitutional issue should be closed by an amendment authorizing appropriations for internal improvements. It would then be for Congress to judge whether or not such appropriations, be they for highways or for other public purposes, were desirable, and to justify its action on grounds of public policy in case its decision were questioned.

8. *Recall.* While an appeal to the country through a general election, in any case in which the Cabinet appealed to the people against the opposition of a hostile majority in Congress, would allow the voters to retire from office any members of Congress whose course was regarded as unsatisfactory, such an appeal would be impracticable where the course of individual Senators or Representatives, and not the course of a majority, had ceased to be acceptable. On the other hand, it is extremely undesirable that any member of Congress, whether Senator or Representative, should be able, by allying

himself with the majority, to cling to office after he has lost the confidence of his constituents. The success of popular government lies in direct and continuous control by the people of their representatives. Unless such control is assured, majority rule becomes only another form of tyranny and an incitement to revolution.

In order to insure such control the people should be given the right to recall their representatives at any time and to elect others in their place. There is no greater practical difficulty in applying the method of recall to Senators and Representatives than there is in applying it, as is the case at present in a number of States, to State or municipal officers; nor is there any apparent reason to suppose that it would be used hastily or frivolously in the one case more than in the other. Both hasty and trivial action would be sufficiently guarded against by requiring a suitable number of signatures to a petition for a recall, and by devolving upon the State the expense of the recall and of the subsequent election if one were held.

Neither the initiative nor the referendum, on the other hand, seems practicable or desirable in Federal practice. Neither device would be effective unless a majority of the States and a majority of the people took part, and to such participation the great extent of the country and the great size of the electorate offer serious obstacles. Any number of

States or congressional districts would of course be free to unite at any time in requesting legislation from Congress, and such requests, where responsible government and the right to recall both existed, could not safely go unheeded. In the same way, responsible government with the recall would in practice secure all the virtues of the referendum. There is neither theoretical nor practical advantage in politics in encouraging the voters to suggest new policies when their right to express their opinion is already safeguarded, nor in appealing to a referendum for the sake of supporting or instructing the majority in Congress.

CHAPTER XII

THE VOTING SYSTEM

THE provisions of the Constitution in regard to voting are few in number and general in character. The electors, as the voters are called, of Senators and Representatives are required to possess "the qualifications for electors of the most numerous branch of the State legislature." The so-called presidential electors, on the other hand, are to be appointed by each State "in such manner as the legislature thereof may direct"—a provision which until the Civil War was variously interpreted, but which since that time has resulted in the choice of presidential electors by popular vote on the same basis of qualifications as that upon which State officers or Representatives in Congress are chosen. A further provision that "each house [of Congress] shall be the judge of the elections, returns, and qualifications of its own members" was apparently intended to give to the Senate and House some measure of control over the action of the States in choosing Senators and Representatives; but no attempt to exercise such control was made until after the Civil War, and the power which the Constitu-

tion conferred was evidently restricted to action by either of the two houses separately, and did not authorize a general regulation of congressional elections by Congress. Over the choice of presidential electors Congress was not empowered to exercise any control whatever.

Following the Civil War, the resistance of the Southern States to the efforts of Congress to force Negro suffrage upon them led to the adoption of the Fourteenth and Fifteenth Amendments. The Fourteenth Amendment, in effect in 1868, provided that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such States, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." The "basis of representation" referred to in the Amendment is what is commonly known as the Federal ratio—that is, the number of inhabitants, both male and female, which under the decennial census is fixed upon by Congress as the number entitling a State to one representative in the House.

In order to close any controversy as to whether or not a Negro could be a citizen, and thus to insure the effectiveness of the penalty provision above cited, the Amendment further provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This provision put an end to the legal distinction between citizenship of a State and citizenship of the United States which the Supreme court, in the famous Dred Scott case in 1857, had elaborated as a reason for denying the right of a Negro to sue in Federal court.

So far as the giving of votes to the Negro was concerned the Fourteenth Amendment was a failure. In 1870, accordingly, the Fifteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The courts have held that the Fifteenth Amendment does not confer the right to vote upon anyone, but merely states certain grounds upon which the right may not be denied or abridged. The right may, accordingly, be denied or abridged upon other grounds, as for example by imposing educational or property qualifications applicable alike to all citizens.

Following the adoption of these Amendments a number of drastic laws were enacted by Congress to give effect to them, and to overcome the organized

resistance to Negro suffrage which had spread throughout the South. The laws, some of whose provisions were open to grave doubt on constitutional grounds, were but little used, and both State and Federal suffrage were generally denied to Negroes except where Federal troops were at hand to insure their exercise. Most of the provisions of these statutes were repealed after a few years, and the control of voting was again in practice left to the States.

The constitutional structure in regard to voting has been completed by the adoption of the Nineteenth Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It will presumably be held by the courts that one of the effects of this Amendment is to eliminate the word "male" from the Fourteenth Amendment.

To sum up: the Constitution undertakes to insure that the persons who vote for Senators or Representatives shall have the same qualifications as those who vote for elective State officers or representatives; that no citizen shall be debarred from voting for Federal or State officers or representatives on account of race, color, sex or previous condition of servitude; that any State which violates the prescription last-mentioned, except possibly as to sex, shall be punished by having its representation in the Federal House of Representatives reduced;

and that each house of Congress shall be the exclusive judge as to whether or not its members have been properly chosen. For the rest, the control of voting is left to the States.

The States have added a great variety of conditions. The period of required residence in the State previous to voting ranges from three months to two years; in the county, from ten days to one year; in the town or city, from ten days to one year; in the election district, precinct, or ward, from one day to six months. Special qualifications required, in addition to registration, include the payment of a poll tax, the possession of a stipulated amount of property, ability to read or write, ability to read and explain (!) the Constitution, "good behavior," and employment. A number of States give the voting privilege to aliens who have declared their intention to become citizens, while others expressly extend it to civilized Indians. The grounds of disfranchisement, in addition to minority, insanity, feeble-mindedness, and conviction of felony, include bribery, malfeasance in office, election crimes, vagrancy, duelling, betting on elections, being under guardianship, teaching polygamy, failure to pay taxes, and profession of atheism. To the disfranchised class are also assigned, by various States, paupers, Chinese, ex-Confederates, Indians not taxed, inmates of charitable institutions, and United States soldiers and sailors.

Whatever reasons there may have been in the past for allowing the States such large and varied practical control of voting as they now enjoy, there is little reason for perpetuating that control longer. It should go without saying that no one who is not a citizen should be allowed to vote, not excepting persons of foreign birth who have declared their intention to become citizens but who have not yet been naturalized. Since, however, anyone who is a citizen, whether by birth or by naturalization, is at one and the same time a citizen of the United States and a citizen of the State in which he resides, his right to exercise his citizenship in the high act of voting should no longer be subject to limitation of any kind at the hands of the State. Such limitations rest upon no sound principle and serve no useful purpose. They cannot be regarded as necessary for the protection of a State, for the reason, first, that no State has either need or right of "protection" against citizens of the United States; and, second, because the Constitution itself provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." They cannot be upheld on the ground that they establish desirable regulations for the exercise of the voting privilege, because the requirements of the several States conform to no general principle and represent little approach to uniformity.

The entire control of the conditions of Federal suffrage should be transferred to Congress. The Constitution itself, in addition to the prescriptions and prohibitions which it now contains, should define with precision the conditions of age and residence required of those who vote for President Senators, or Representatives, and the classes of persons from whom the right of voting shall or may be withheld. Such conditions, which would of course be the same for all the States, should on no account include any kind of property or tax qualification as a prerequisite for voting, but they should safeguard the right to vote of any citizen who for good and sufficient reasons, changes his residence between one voting date and another. To Congress should be given the usual power to pass laws necessary to put the constitutional provisions into effect, to establish in its discretion an uniform system of registration, and to punish violations of the Constitution and the enforcing laws.

Such changes in the Constitution would, of course, be in conflict with the existing provisions regarding the choice of Senators and Representatives. In each of these cases the voters are now required to have the same qualifications as are possessed by those who vote for the most numerous branch of the State legislature. It were better, therefore, that the existing definition should be done away with, and that Federal suffrage and State suffrage should

henceforth rest each upon its own basis. This would permit a State to grant the suffrage in State or local elections on terms different from those laid down for Federal elections, and with as little regard as now to the practice of other States. There is no reason why the States should not have such diversity of usage if they so desire, provided that no Federal interest is impaired thereby. The point is not of great importance, however. One may reasonably anticipate that the establishment of an uniform electoral system for the United States would lead in a few years, if on no other grounds than those of simplicity and economy, to the adoption of substantially the same system by the States.

Complete constitutional control of Federal elections would also facilitate the imposition of effective penalties upon the Southern States, in which the great bulk of the Negro population is in practice disfranchised and where the situation has been rendered still more acute by the adoption of the Amendment extending suffrage to women. The cowardly neglect of Congress to enforce the penalty provision of the Fourteenth Amendment in the case of the South, and the failure of every President for more than forty years to insist upon congressional action, are a shameful blot on the page of American history. The fact that the penalty prescribed by the Fourteenth Amendment is mandatory and not permissive makes Congress and the President only the more culpable.

It may well be questioned, however, whether the penalty in this case ought not to be made more drastic. As the matter now stands, any State which violates the provisions of the Constitution in regard to suffrage is liable to a reduction of its representation in the House of Representatives. In view of the fact, however, that every State in which the Negro vote is suppressed has a considerable white population, the total elimination of the Negro vote would still leave the State with Representatives in the House. This means that, even if the constitutional penalty were fully enforced, the whites, who are responsible for the disfranchisement of the Negroes, would continue to be represented in Congress, and the State which has violated one of its constitutional obligations would continue to take part in the conduct of national affairs.

Since it is the State as a State which has sinned by white usurpation of power, it is the State as a whole that should be excluded from representation in the House. Possibly it could not be excluded from representation in the Senate, because the Constitution apparently contemplates the equal representation of the States in that body, notwithstanding their violation of a constitutional obligation, so long as a State remains a member of the Union. It can and should, however, be debarred altogether from representation in the House and from participation in presidential elections so long as its violation of the Constitution continues. The right of

the Senate or the House to declare vacant the seat of a member who has been improperly elected, while as a rule exercised only in the case of States which do not have the "negro problem" and in practice always followed by a new election, supports the view that no representation should be allowed to a constituency in which the requirements of the Constitution and of the laws are not observed. It is time that the States which regularly suppress the larger part of their Negro vote should be made to realize and perform their constitutional obligation.

CHAPTER XIII

A NEW BASIS OF REPRESENTATION

THE present practice regarding representation in the United States is in form extremely simple. Every adult citizen who is resident in a State, if he be of sound mind and not disqualified by law, is entitled to vote. Candidates for the Senate and for presidential electors are nominated by various political parties at State conventions, and are voted for on general tickets. For the choice of members of the House of Representatives each State is divided into districts, each of which is entitled to one Representative; and the voters cast their ballots for one or other of the candidates whom the parties have nominated. Were the antiquated system of presidential electors abolished and the President chosen by direct popular vote, without any other change in the scheme of representation the names of the presidential candidates also would appear on every ballot in every congressional district, and each voter would vote for the candidate of his choice. If there are more than two candidates for the same office the choice at present is by a plurality, the candidate receiving the highest number of votes,

whether it be a majority of the whole number or not, being elected. If there are only two candidates for an office, a simple majority of course determines the result.

Each Senator represents his State, not only as a subdivision of the United States, but also as an organized political community or commonwealth which, in union with all the other similar communities or commonwealths, forms the United States. The inhabitants of the District of Columbia and of the Territories or other possessions, although subject to the jurisdiction of the United States and entitled in general to the benefits of the Constitution and of Federal laws, either do not vote at all, as in the District of Columbia, or else vote only for certain members of their own special governments and for delegates who may speak for them in the House of Representatives. The State, on the other hand, guaranteed by the Constitution an equal representation with every other State in the Senate, preserves a certain political individuality of its own. The constituency of a Senator, accordingly, is his State. What a Senator represents is the whole composite of territory, people, government, laws, and social institutions which makes up a State and bears a State name. Neither of the two Senators to which each State is entitled is constitutionally more important than the other, and individually and collectively they represent the State whether they belong to the same political party or to different parties.

The position of the Representative in Congress is different. He does not represent the State as a State in the sense that a Senator represents it. The district from which he is chosen is only an electoral area created by the State for the sole purpose of electing a Representative; it plays no part in the government or political life of the State otherwise, and has no political organization or life of any kind save that which political parties give to it for a few weeks or months during an election campaign. The constituency of a Representative is the people of the State—not merely the people of his particular district, but also the people of the whole State of which the people of the district form only a fractional part. It is the joint action in Congress of those who represent the States and those who represent the people that is necessary for the enactment of laws, at the same time that the initiative in imposing taxes is reserved specifically to the body which primarily represents the people.

A little examination of this representative system, in connection with the voting system which has just been discussed, reveals a curious incongruity. The voter who casts his ballot on the day of a national election assumes for the time being a strange and anomalous position in the community, and performs an act which, were he to reflect upon it, he would find it hard either to explain or to defend.

Save in certain important but quite narrowly limited relations of life the average citizen has little

everyday consciousness of the State, or of the United States, or of the people of the country as a whole. In a more or less subconscious way he recognizes the existence of the State or of the nation because he obeys the law, does business with national currency, uses the Federal mails, and pays taxes. Under the stress of excitement or of danger he may be for a short time keenly conscious of his citizenship—highly proud of it or uncomfortably ashamed of it, ready to fight for it, or anxious to escape its responsibilities. Actually, however, he lives his daily life as a member of one or another social group. The community which he knows is not the great and imposing thing with which statesmen and politicians assume to deal, but the small and often local world of his own occupation, his own business, or his own profession. He is a farmer, or a skilled workman, or a merchant, or a banker, or a physician, or a lawyer, or an engineer or a teacher. Within the group to which he belongs he finds his principal field of work, and through membership in one group he establishes contact with a few other groups more or less related to it. Moreover, he comes to have a group consciousness. The things in which he is most interested are the things which concern the welfare of the group with which he is principally identified, and his own welfare as a member of it.

When, accordingly, he thinks of the State or of the nation, it is likely to be of the State or of the nation as related to his group. Bad government means injury to the group with which his interests are partic-

ularly bound up; good government means advantage to the group. If the group is one which, like that of bankers or lawyers or locomotive engineers, is spread throughout the country and has common group problems of a rather precise sort, his view of government and politics may easily become national; and if at the same time he is educated and unselfish, he may seek the special welfare of the group through the welfare of the country as a whole. On the other hand, if he is ignorant, selfish, or corrupt, the welfare of the whole community will usually be only a phrase with which to hide an ignorant, selfish, or corrupt purpose. Whatever the intellectual or moral outlook, however, it is with the overwhelming majority of men the influence of the group, and not the consciousness of the community, that determines the point of view toward public affairs. It is only in exceptional individuals and under exceptional circumstances that this group consciousness assumes a minor place and the interests of the State or the nation come predominantly to mind.

On a day of election, however, all this is for the moment changed. The voter is then expected, on one day in the year or in two years or in four years, to lift himself in some mysterious way out of the group relationships which are his daily habit, and to act simply as a member of the State or of the congressional district or of the whole country. Everything which ordinarily gives him place or distinction or individuality or sense of kinship with others in his group is to be for the time being laid aside, and he is

invited to act as one of some thousands or millions of people all of whom are assumed to be alike. More often than not he is asked in voting to choose between candidates no one of whom he has had any real voice in nominating and no one of whom he knows. The policies which have been set forth in party platforms deal with many things which he does not very well understand and with others which seem remote. Whether or not the persons who will be elected represent other groups or aggregations of people is a question in regard to which he is usually either ignorant or suspicious; the only thing of which he is tolerably certain is that they do not, save in a vague and conglomerate way, represent him.

Our representative system, in other words, is very imperfectly representative. It represents well enough the people of the United States or of the States considered simply as population, capable of being numbered or grouped on an arithmetical basis; but it does not represent them at all in the social circumstances or conditions in which they actually live. A popular vote on an election day may be likened to a quantity of shot poured out of a pail—greater or less in volume as the case may be, with each piece of shot exactly like every other and wholly separate from every other, and ready to be counted or weighed when all have been poured out. But people do not live as a mass of equal and unrelated particles like shot in a pail; they live in groups, they think in groups, and they have vital group interests.

Yet as groups they are not really represented at all. There are always many lawyers in Congress, but none of them is there as a representative of the lawyer class. There are always members of Congress who have been or who are farmers or doctors or clergymen or editors, but none of them represents or is authorized to speak for the social group to which he belongs.

It seems clear, therefore, that if the United States is to have in Congress a truly representative national legislature, the existing system of representation must be changed so as to admit of the representation not only of population, as now, but also of recognized occupations or professions.

The representation of population as such, on an arithmetical basis, is an entirely proper method provided it is not exclusive. It is proper that the citizen should be made to realize that, whatever his group interests, he is also member of the State and of the nation, and that as such he is on a footing of equality with every other citizen and responsible jointly with his fellows for the conduct of public affairs. Such representation of population in the aggregate is already in part provided for by the composition of the Senate. So long as the States are represented equally in the Senate—and that requirement of the Constitution, as has already been pointed out, we are morally bound to preserve—it would be inappropriate for Senators to represent anything less than the entire population of the State. What-

ever occupation or profession they may individually belong to, they ought not as Senators to represent any group interests.

The House of Representatives, on the other hand, might well be divided between members who represent population and members who represent professions or occupations. There are two important reasons for this. One is that since all occupations or professions could not possibly be given separate representation, it would be necessary to allot a certain number or proportion of the State's quota to the voters who could not be given group representation; otherwise large numbers of persons in every State would have no representation at all. The other reason is that the Constitution gives to the House of Representatives the right of originating bills for raising revenue; and it would be manifestly unfair to give to group Representatives only, where every group cannot be represented, the right of proposing taxes which must fall upon every citizen whether he belongs to a represented group or not.

The precise mathematical division of the members of the House into those who represent population and those who represent occupational or professional groups is not, perhaps, of fundamental importance. It is suggested, however, that since with the progress of society groups are likely to increase in size and in number, and since in any case group representation should be encouraged, a majority of the Representatives in the House from each

State should represent groups. In States which, like Colorado and Maine at present, have but four Representatives in the House, or in which, as in Montana and Vermont, the number of Representatives is two, an equal division between the two classes would be appropriate.

The representation of occupations or professions, or of what will hereafter be referred to for convenience as occupational groups, while naturally involving a considerable departure from the present method of conducting congressional elections, does not involve any serious practical difficulties. The following would be a workable procedure:

1. The total membership of the House of Representatives, together with the number of members to which each State is entitled, would continue to be fixed as now by act of Congress on the basis of the decennial census of population.

2. Of the total number of members allotted to any State a bare majority—or two members if the total number of members for the State were four—should be designated as Representatives of occupational groups, and the remainder as Representatives at large.

3. Where the number of members at large was small—say, for example, five or less—they should all be elected on a general ticket in the same way that Senators are chosen. Where the number of members at large exceeded five, the State should be divided by the legislature into as many districts as

there are members at large to be elected, one member being chosen from each district.

4. Any recognized occupational group in the State which numbered one hundred or more qualified voters should be at liberty to nominate a candidate for the House of Representatives. The nomination should be made through a State convention, or by petition, or in any other way that Federal law authorized or required. The person so nominated might or might not be a recognized member of the occupational group in question; all that is necessary is that he should be acceptable to the group as its Representative, and that he should be constitutionally qualified to hold office in case he were elected. No Representative at large should be allowed to stand also as the candidate of an occupational group.

5. The names of all the candidates nominated by occupational groups in the State should appear on the official ballot, and should be voted for as a general ticket for the State. The candidates having the highest number of votes, in number equal to the number of Representatives of occupational groups to which the State was entitled, would be the ones elected.

One or two of the points mentioned in the foregoing outline call for further consideration.

(1) There appears to be no sufficient reason why a State whose population entitled it to only a small number of Representatives in the House should be

divided into districts. Even under the present system of election such division serves no essential or particularly useful purpose. Candidates in small States are as a rule as well known throughout the State as candidates in larger States are throughout the district, and the aggregate number of candidates is not so great as to burden or confuse the voters if they are voted for on a general ticket. Where a large number of names, on the other hand, appear on a general ticket many of the names are likely to be unknown, or practically unknown, to voters in particular localities. In such case a division of the State into districts and the nomination of candidates by districts is the better method.

It is not practicable to district a State for Representatives of occupational groups. While it is true that the membership of certain groups, like miners or lumbermen, is likely to be massed in particular parts of a State, far the larger number of such groups have their membership widely scattered. Any scheme of districting which took account of the geographical distribution of any one group would be almost certain to do injustice to most of the other groups. The choice of group Representatives by a general ticket becomes, therefore, a necessity, in addition to being the only equitable method of allowing the group as a whole to express itself.

(2) It is probable that, under the system here proposed, the number of candidates nominated by the various occupational groups would considerably

exceed the number of group Representatives to be elected. The result, it may be urged, would be that only the largest groups would have a chance of electing a Representative, and that a considerable number of small groups would be more or less permanently excluded. The system would thus become in practice one for the representation not of occupational groups in general, but only of such groups as happened to be most numerous in the State. To the extent that it is obviously impossible, in a highly organized society, to give direct representation to every occupational group without providing for a legislative body of unreasonable size, the objection is valid. Aside from this, the objection errs in the matter of emphasis. The essence of group representation is that every recognized occupational group with any appreciable number of members shall have a chance to express itself in the nomination and election of candidates. But it is not at all necessary that every candidate shall himself be a member of the group which nominates him and votes for him. There is no reason, for example, why locomotive engineers should invariably be represented in Congress by locomotive engineers; they may prefer, for various reasons, to be represented by someone who belongs to the building trades, or by a miner or a lawyer or an editor. What is essential is that they shall have an opportunity to nominate a candidate who is acceptable to them and to support the nominee as their candidate at the polls.

What would happen in practice is that occupational groups having some natural relation one to another would unite in the selection of candidates, or would endorse candidates already favored by other groups. Wherever a group was not strong enough numerically to elect a candidate of its own, fusion nominations would be made much as they are made under similar circumstances now. Even if such fusion of group interests were not inevitable on practical grounds, it would nevertheless be of advantage on general principles. It would tend to bring about better understanding between different but related groups and to increase consideration for minorities. It would help the members of recognized groups to keep in mind larger and more general public interests as well as their own particular concerns. The union of occupational groups for political action is a better guaranty of national stability than is a union of individuals who, outside of their groups, feel little organic relation one with another.

CHAPTER XIV

THE PARTY SYSTEM

THE establishment of a system of representation such as has been proposed would work a number of changes in the methods of American political parties, and would modify in certain respects the existing party system as a whole. It will now be in order to inquire what those changes and modifications would be.

The Constitution of the United States knows nothing of political parties. Neither directly nor indirectly does it recognize or even assume the existence of parties. It provides for the election of a President and of members of Congress through methods which are the same for every State but without any recognition of the differences of political opinion which may exist among the voters, or of the political means which may be taken to organize such opinion along party lines or to influence the conduct or the outcome of an election. It is true that the Senate and the House of Representatives are given the exclusive right of judging of "the elections, returns, and qualifications" of their

respective members, and that by implication they may inquire into the circumstances of an election and refuse to seat a candidate whom they judge to have been improperly elected; but such authority does not involve the constitutional recognition of political parties, nor is there any clear indication of the point at which Federal control of elections begins and State control ends.

Only in recent years have the States themselves begun to recognize political parties in their laws. Moreover, such recognition as is now accorded is mainly limited to statutes intended to prevent or punish fraud, or limit the use of campaign funds, or require the publication of campaign expenses, or prescribe the form of ballot, the conditions under which nominations shall be recognized, and the method of voting and of counting the vote. There are recent Federal statutes to the same general effect. None of these regulations, however, whether Federal or State, attempts any general control of parties as such. They assume that parties exist, and they undertake to punish misconduct on the part of individuals; but the party as such has no legal existence and consequently has no legal responsibility.

Anomalous as such a state of things may at first sight seem to be, it is at bottom in accord with sound principle. A political party ought not to be, and indeed cannot well be, invested with a legal character. It is an association of citizens who,

agreeing in certain essentials of political belief and distinguishing themselves by a party name, undertake to act together for the time being in the nomination of candidates and in the effort to elect them. The party is an organized or mass expression of the opinions and desires of a part of the whole people. Anyone who agrees with it may join it, anyone who is dissatisfied may withdraw at any time. The party itself may change its character or its principles without changing its name, and may cease to exist without formal action of any kind. To endow such union of a part of the people with a legal character, to require it to organize as a corporation or trust, or to invest it with the right to hold property or to sue or be sued, would have the effect of bringing political opinion of all kinds under the jurisdiction of the courts and subject it to the danger of coercion by the police or by the army and navy. It is of the nature of a party that it should always remain a thing intangible, that it should be free to express itself without fear of legal interference, and that it should be responsible solely to public opinion.

The political history of the United States shows very clearly, however, that while the party as such has been left without constitutional or legal recognition save as its existence is to some extent assumed, the course of party history has done little to encourage either a discriminating or generous expression of public opinion by party means. For the larger part of the time since the establishment of

the present Federal government, the political field has been practically monopolized by two great parties. The historical origin of those parties, as has already been pointed out, was in a fundamental difference of opinion as to how the new Constitution should be interpreted; one party desiring as liberal an interpretation as possible in order that the powers of the Federal government might be magnified and those of the States restrained, the other insisting upon a narrower and more literal interpretation in order that the powers of the States might be preserved. And since, during more than eighty-five years, questions of constitutional interpretation formed the main thread of national politics, the two-party system continued on the whole predominant and so-called "third parties" tended to be local and short-lived.

Now that constitutional issues of the older kind are no longer the chief interest of the country, the evils of the two-party system have become everywhere apparent. They show themselves in the increased dissatisfaction of the people with both of the two great parties, their methods and their leadership; in the ominous development of an "invisible government" of business, finance, and class which, playing one party off against the other and to a considerable extent controlling them both, manipulates politics for its own advantage; in the intrusion of national issues into municipal affairs; and in the arrogant assumption of party leaders that "third"

parties are either merely local, or freakish, or revolutionary. The recent scandalous attacks upon the Socialist party in New York, the efforts of the Federal government to disintegrate and destroy the Communist party, and the Federal espionage reported to have been exercised over meetings of the Farmer-Labor party, are only more startling illustrations of the intolerance of political dissent which an outgrown two-party system has directly fostered, and of which the United States is unhappily the most extreme example in the world.

It is necessary to the political health of the United States that the right of free organization of political opinion should be, not restored, for it can hardly be said ever to have existed for long, but established. The right cannot be regarded as established so long as those who form or support a new party are looked upon with suspicion by the public or subjected to espionage by the government, or so long as discriminating State laws interpose effective if technical obstacles to the recognition of a new party on an official ballot. The right to form a political party is a natural right of the people, and every impediment to its free exercise should be swept away.

In order to establish the right it is necessary to break the control which the two-party system now exercises. A division of the great majority of the voters of a country into two parties and only two is not a natural division. It is not a division which

is found in European countries, where the expression of political opinion is admittedly much freer than in the United States; and it has existed for considerable periods in England mainly because of the continuance there of class distinctions and legal discriminations which have helped to foster it. The natural division of any large number of people over a public issue is into a variety of groups in which race, religion, territorial distribution, economic status, political opinion or prejudices in general, and numerous other elements constitute determining factors. The two-party system, by its inevitable tendency to eliminate all grounds of difference save one, and that one not necessarily the most vital, forces public opinion into a characterless mold of composite compromise, and by repressing dissent represses also the growth of intelligent opinion and strengthens the power of the political machine. No country can be politically sound in which the discussion of public policy is not both active and unrestrained; and the natural tendency of free and active discussion is toward the formation not of two party groups but of several.

The establishment of the new basis of representation which has been proposed, taken in connection with the introduction of responsible government, would contribute directly to the breaking down of the existing two-party control. Once the right of an occupational group to meet in convention, nominate a candidate for Representative in Congress, and

have the name of the candidate appear on the official ballot, were recognized by the Constitution and by Federal law, action by such groups would be encouraged. National parties, bidding for the support of various groups, could no longer do so as monopolists, and the stigma which now attaches to "third" parties would disappear because it would be too dangerous a thing to perpetuate. Candidates would represent actual bodies of opinion among the voters instead of representing, as is too often the case now, formal declarations of opinion embodying evasion and compromise.

It is not, of course, to be understood from what has been said that the adoption of a system of group representation would destroy the party system. Whatever the scheme of popular government, the formation of parties is a natural, if not indeed a necessary, method of expressing the popular will. What group representation would do is to facilitate the mutiplication of parties, to make it easy for any occupational group to become also a party if its members so desired, to give smaller parties a better chance than at present of representation in Congress, and to make it unlikely that any two parties would long divide the great majority of voters between them.

It cannot be too often repeated that the success of representative government, whatever its form, depends at bottom upon the preservation of the unfettered right of the people to express their opinions

at the polls. The inherent vice of the American party system is that it impairs, and to a considerable extent destroys, that right by its assumption that there can be at most only two opinions of importance on any public question. The argument that is sometimes urged that national affairs have in fact been best managed when one party possessed a clear majority in Congress and in the country is unsound. It is true that a party which has a clear majority is free to carry through its program without hindrance, and that it may in consequence enact a good many laws to which its spokesmen will "point with pride." But it is also true that every party in our history whose control has been uncontested for any long period has become arrogant and self-centered, has often ruthlessly sought to repress dissent, and has either been torn by revolt within its own ranks or has met defeat at last at the hands of the people. No such party long loves freedom or pursues it. And it is in the interest of freedom that the two-party system should be broken down and all the varying opinions of the people be given opportunity for expression.

It is not desirable that the Constitution should undertake to determine the conditions under which a political party may be formed, or to define the limits within which it may act, or to make it responsible in law for any of its proceedings. It is desirable, on the other hand, that the Constitution should recognize the right of any group or number

of citizens to form a party, to take a party name, to adopt regulations regarding precedure, to nominate candidates to be voted for at any election, to have the party name and the names of candidates placed upon official ballots, and to have the votes cast for the candidates counted and returned as votes for the party. In so far as Congress is given control of Federal elections the enjoyment of the privileges mentioned would be guaranteed by Federal statutes. In so far as the conduct of Federal elections is in any way shared by the States, the States should be specifically forbidden to infringe upon or restrict any of those privileges. Finally, the Constitution should expressly provide that a political party shall be responsible only to public opinion for its acts, and shall in no case be subject to the jurisdiction of any court of law, whether Federal or State, or to interference by the executive power of any State or of the United States.

CHAPTER XV

THE STATES

THE Constitution of the United States was framed upon the assumption that all the powers of government, in the nature of things unlimited in extent, which the people possessed might be exercised on their behalf by the States, except in so far as the people and the States had voluntarily divested themselves of certain powers which they gave to the United States. On this theory the United States could do only the things which the Constitution, in express terms or by reasonable implication, authorized it to do, while the States could do anything which they were not forbidden to do by the Constitution or which they had not through that instrument turned over to the United States. Hence such common phrases or illustrations as that the United States was a government of delegated powers or that the States were like the residuary legatees of an estate.

Naturally, therefore, the Constitution makes no attempt to define or enumerate the powers of a State. Beyond the guaranty to every State of a republican form of government—a phrase which is

left without definition—it does not undertake to prescribe the particular kind of political organization which any State shall have, and does not assume that the detailed form will be the same in every State. Its references to the States are in the main of three kinds. Certain duties are imposed upon the States in connection with Federal elections and with the ordinary working of the Federal system; certain things are specified which a State may not do; and the Federal Constitution, laws, and treaties are declared to be "the supreme law of the land."

An examination of the constitutional provisions relating to the States, except those which have to do with elections, seems to show that they originated in a desire to avoid in the future certain unhappy conditions which had prevailed in the States under the Articles of Confederation (1781–87), and which made a thoroughgoing amendment of the Articles necessary. The period of the Confederation, although it saw the successful ending of the Revolutionary War, was a period of sharp controversies between States, of open defiance of or contempt for the national government, of assaults upon the State governments so severe as to threaten their overthrow, and of disordered trade and worthless currency. Hence such provisions as that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"; that "no State shall enter into any treaty,

alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts"; that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; and that the United States shall guarantee to every State a republican form of government and protection against invasion or domestic violence.

It has already been pointed out that, in the development of government under the Constitution, the Federal government has gained power at the expense of the States. The decline of the relative importance of the States, especially since the Civil War, has been one of the striking phenomena of our history. While the States still retain organic political life and exercise important powers, both their independence and their authority are declining, and seem destined to decline more and more as the scope of Federal power widens. So long as the national government retains its federal character, however, the States can never become, like the departments in France, mere administrative sub-divisions of the central government, nor will they cease to derive their essential powers from the people rather than from the Federal Constitution. It is important, therefore, to note the respects in which the powers and duties of the States as set forth in the Constitution, and the obligations of the United

States with reference to the States, need revision or further definition.

1. *Enforcement of Federal law.* The courts early held that no State is under obligation to enforce a Federal statute. It must, of course, recognize the supremacy of Federal law in its courts, and must refrain from passing laws of its own which would run counter to Federal law on the same subject; but the enforcement of Federal legislation is the affair of the Federal government. Were the contrary principle to prevail, the slight measure of convenience which might in a few cases result from the use of State machinery for Federal purposes would soon be overborne by the conflicting actions of State legislatures and executives and the conflicting decisions of State courts; at the same time that it would inevitably lead to a Federal interference with the State governments which every State would properly resent. The only exception in the Constitution to the application of this sound principle is to be found in the prohibitory amendment (Amendment XVIII) which gives to the States concurrent power with Congress to enforce the provisions of the Amendment; but even here the exercise of the power is permissive, not mandatory.

It is in every way desirable that the entering wedge driven by the provision of the Eighteenth Amendment just referred to should be removed, and that a principle which has always been regarded

as both fundamental and important in the working of the Federal system should be clearly set forth in the Constitution itself, and not left, as it would appear to be left at present, to the debatable field of constitutional theory. The statement of the principle should also include treaties, which like Federal statutes are also a part of the "supreme law of the land" and, equally with statutes, outside of any duty of a State to enforce them.

2. *Guaranty of a republican form of government.* While the Constitution, as has been said, does not define the kind of government which it designates as republican, the forms of government which have prevailed in the different States have generally been regarded as meeting the requirement of the Constitution. In only a few instances has the Federal government been called upon to decide which of two rival governments was the true government of the State, and in those instances the question has been as to which government was legal rather than as to which was republican.

It can hardly be denied, however, that observance by the State of the fundamental requirements which the Constitution lays down is one of the conditions necessary to give to a State government a republican character. The application of this test reveals at the moment a grave situation in a considerable number of States. The Fifteenth Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by

the United States or by any State on account of race, color, or previous condition of servitude." It is notorious that this provision of the Constitution is now, and for years has been, flagrantly nullified by the Southern States; and it may fairly be questioned whether any of those States has to-day a republican form of government within the clear meaning of the Constitution.

A similar doubt, although one which rests upon entirely different grounds, has long existed in the case of Rhode Island. Under the Constitution of that State each town or city is entitled to one member in the State Senate. The extraordinary inequality in the distribution of population, in consequence of which the city of Providence contains nearly one-half of the total population of the State, has the effect not only of grossly reducing the influence of Providence in the State Senate, but also of magnifying to the point of grotesqueness the influence in that body of towns with only a few hundred inhabitants. The enactment of ordinary legislation and, what is more important, the adoption of any resolution to amend the State Constitution or to summon a convention for that purpose, may at any time be controlled, and has in fact repeatedly been controlled, in the last resort by Senators who represented towns containing collectively only about ten per cent of the population of the State. As the Rhode Island courts have held that a constitutional convention could not lawfully be convened unless summoned by the legis-

lature, and as the small towns, some of which are notoriously corrupt, refuse to jeopardize their control by agreeing to a convention, the only recourse for the people, apparently, is a revolution. A State which cannot without resort to revolution have a constitutional convention for the purpose of remedying glaring defects in its governmental organization can hardly be said to enjoy a republican form of government.

It may, perhaps, be questioned whether the provision that the United States shall "guarantee" to every State a republican form of government implies anything more than that the United States is to uphold an existing republican State government in case the latter is in jeopardy. Whatever doubt there may be on that point, however, ought to be removed. Two amendments would accomplish that removal. The first should empower Congress to determine whether or not the government of any State is republican, either by acting on its own initiative on the basis of facts publicly known, or on the petition of a reasonable number of citizens of the State. In case the government of the State were adjudged to be not republican, the State should be debarred from representation in either house of Congress until such time as a republican government was restored. The second amendment should require every State to maintain a republican form of government. As the Constitution now stands, the guaranty which the United States is bound to honor

is not accompanied by any reciprocal obligation on the part of the States.

It must be pointed out, however, that the question of the constitutional propriety of any form of State government should in no case be allowed to come before the Federal courts. The essential elements of such a controversy are political, not legal, and should be passed upon by Congress and the executive and not by the judiciary. Just as the Constitution itself provides that "new States may be admitted by the Congress into this Union," so also should the decision rest with Congress as to whether any State which is in the Union is fulfilling its constitutional obligations.

3. *Protection against domestic violence.* The constitutional guaranty to the States of protection against domestic violence is made contingent upon the application of the legislature, or of the State executive "when the legislature cannot be convened." It would be better if both of these restrictions were removed. There can be no doubt of the right of the United States to intervene, without any request from the State, for the suppression of domestic violence which threatens Federal property, such as a custom-house or post-office, or a clear Federal interest, such as interstate commerce. A community which suffers from an outbreak of disorder which the municipal or State authorities cannot control, however, is mainly concerned with the injury to which the community as a whole is exposed rather

than with the particular Federal interest which the disturbance affects; and since most disorders of a grave sort are likely to become general in extent, it is desirable that the United States, if it is to intervene at all, should do so on general principles rather than on particular ones. Moreover, since every employment of force by government, however apparently necessary at the time, inevitably leaves in its wake bitterness, resentment, and suspicion in some quarter, it were better that the responsibility for the use of force should be clearly fixed, and not divided as it often is at present between the United States, the State, the local government, and private individuals or corporations.

In this connection the Constitution should be so amended as to forbid any person or corporation engaged in interstate or foreign commerce, or in the conduct of any business under Federal authority, to maintain or employ bodies of armed guards, police, or so-called detectives for the protection of of its property or for any other purpose. The States should also be prohibited from allowing such bodies of armed men to be employed for the benefit of any person or corporation doing business under State authority. The widespread employment of bodies of armed men by great corporations, and the growth of private agencies which make a business of supplying armed men on request, have become a public scandal and a social menace, and have virtually revived in modern times the ancient institu-

tion of private war. The maintenance of order and the routine protection of individuals and property are the business of the community, and the flagrant usurpation of that public function by private organizations and business corporations should be ended.

A second important reason for enlarging the power of the United States to deal with domestic violence in a State is that, without such enlargement, there is no practical hope of suppressing the greatest of all American social crimes—lynching. How, in general, the "mob psychology" which expresses itself in lynching may best be dealt with is a problem for the sociologist; but there is much reason for believing that indulgence of that particular form of "psychology" would speedily become less general and respectable if the full power of the Federal government were available to punish the individuals and communities which practice it. There is abundant warrant for such exercise of Federal authority in the obligation of the United States to protect its citizens and in its exclusive control of foreign relations; but the authority has small chance of being exercised so long as a request from the legislature or the executive of a State must first be made. With that impediment removed, the criminal neglect of constitutional obligations which has long characterized the States in which lynching most frequently occurs ought soon to give way to an attitude more nearly in accord with elementary principles of civilization.

4. *Religion.* The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Like numerous other provisions of the Constitution, this prohibition is not accompanied by any corresponding prohibition upon the States. While it is unlikely that any State will in the future establish any form of religion as the official religion of the State or prohibit freedom of religious faith or practice, there is no reason why the constitutional prohibition which is laid upon the United States should not also be laid upon the States. The States should also be prohibited from appropriating money or granting aid of any kind to institutions of any description which are owned or controlled by, or which are regarded as under the special care of, any religious sect unless the right of inspecting and regulating such institutions in all respects is accorded to the State.

5. *Assembly and pension.* The First Amendment forbids Congress to pass any law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Here again no corresponding prohibition is laid upon the States. But since most public meetings can now be held only under the authorization of the State or, what comes to the same thing, under permits issued by local government officials, the control of both assembly and free speech is virtually in the hands of the State. It is notorious that

the right of assembly, which the Constitution clearly intended should be left entirely without restriction so far as the Federal jurisdiction was concerned, is in fact abridged and often arbitrarily denied by the States and by Federal authorities. An end should be put to State interference at this point by imposing upon the States the same prohibition which the Constitution imposes upon Congress. The failure of the Federal government to observe its constitutional obligation cannot be remedied by any process of amendment, but must await the growth of a public opinion which will make such misconduct impossible.

6. *Arms.* The Second Amendment declares that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." As generally interpreted by the courts and in the practice of government this Amendment, which dates from 1791, authorizes every State to maintain a militia, but also sanctions any prohibition or restriction which a State may choose to impose upon the possession of arms by persons not in military service. In a number of States, as result of this interpretation, the possession of arms without a government permit is by law a misdemeanor. There is nothing in the language of the Amendment which justifies the restricted interpretation which has been given to it. However desirable it may be that the duty of the community to protect life and property shall be fully performed, and whatever mischief may on occasion

arise from the ignorant or criminal use of arms by persons who do not belong to the militia or the police, the right of the citizen to have arms in his possession without governmental permission of any kind is clearly given by the Constitution. Arms which are locked in an arsenal and used only by a militia regulated by Federal law can in no proper sense be regarded as either "kept" or "borne" by "the people."

The only qualification is the one which attaches to every personal right, namely, responsibility in law for any misuse of the right. The folly of a judicial interpretation, backed by legislative approval, under which any employer may surround himself and his property with armed guards under the plea of protecting himself from his employees, at the same time that his employees are made liable to fine or imprisonment if arms are found in their possession, ought to be apparent. The Amendment should be restated so as clearly to separate the right of the citizen to have arms in his possession, which should be recognized, from the right of a State to maintain a militia.

7. *Militia.* The Constitution of the United States does not require any State to maintain a militia. It rather assumes that a militia exists, and provides for the exercise of certain control over such a force by Congress and for the recognition of the supreme authority of the President as commander-in-chief. In other words, the Constitution makes certain stip-

ulations regarding a militia in case there be one, but it neither creates one nor requires the States to do so.

The reason for what might otherwise seem to be a peculiar omission is to be found, of course, in the condition of the country at the time the Constitution was framed. The active military operations of the Revolutionary War practically ceased in 1781, although the definitive treaty of peace with Great Britain was not signed until two years later. In the interval between 1781 and 1787, when the constitutional convention met, the regular army of the United States dwindled to nothingness, the volunteers deserted or were discharged, and the militia organizations of the States retained in many cases only a shadowy existence. It was assumed, apparently, that the State militia would in time be revived and that it, rather than a Federal army, would be the chief reliance of the States against domestic violence and the first reliance of the nation in case of foreign war. To have required the States to reorganize and equip a militia at once, however, would have been to ask what few States at the time would have been able to perform. Hence the constitutional provisions for the regulation of a militia whenever one should be formed.

There is no longer any sufficient reason for maintaining a State militia. Except for one or two very brief periods the militia has never been an efficient body, and when called into active service in war its lack of preparedness has as a rule been pitifully

obvious. The maintenance of the militia involves an annual expenditure of many millions of dollars, for far the larger part of which the State receives no appreciable return. The employment of militia in strikes has embittered industrial relations, and its success in dealing with riots or calamities has rarely been distinguished. The sudden and enforced withdrawal of men from their ordinary occupations whenever a call for active service is issued is a serious disturbance of business, at the same time that it involves a financial loss of considerable magnitude. The States themselves have shown how little reliance is to be placed in a militia by their frequent calls for Federal troops when disorder reached a serious stage.

The militia, in short, is an outgrown device. All the service which it now performs or which it has performed for many years could be better performed by the regular army, and with a consequent saving to the States of the entire cost of the present militia system. The uselessness of the militia is especially obvious in those States which have developed a State police. In Pennsylvania for example, no less than five separately organized bodies of armed men have for some time been available for the enforcement of law and order. Three of these bodies—the State militia or National Guard, the State constabulary, and the municipal police forces—are maintained by the State or by its local governments. To these are to be added the regular

army, which may at any time be called for if the State deems its presence necessary, and the private armed bands more or less regularly maintained by certain corporations. A similar situation obtains in New York.

The entire militia system should be abolished as no longer necessary. The forces of the regular army, distributed as they now are about the country, are ample to deal with any outbreak of domestic violence which local and State police cannot control. So long as the States are forbidden to declare war and are guaranteed by the United States protection against invasion and domestic violence, the argument for a militia falls to the ground. If the maintenance of a militia be urged on the ground that it provides a reserve force which may be called upon in the event of foreign war, that in itself is sufficient to condemn it, because the United States is happily in little danger of attack unless an attack is provoked, and in any case should be taught to rely upon the righteousness of its conduct, the moral force of its persuasion, and its friendly interest in the welfare of all peoples, rather than upon a trained citizen soldiery constantly ready for action, for its safety and repute among the nations.

8. *Inspection laws.* Article I, Section 10, of the Constitution contains the curious provision that "no State shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its

inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." The provision as a whole is antiquated, since the cost of enforcing such inspection laws as the States from time to time have passed has usually been borne as a general charge on the State treasury, and has not been met by taxing the articles inspected. Now that the inspection of food, cattle, and other products, together with the protection of the public health against contagious or epidemic diseases, has been largely taken over by the Federal government, the need of similar action by the States has not only been much reduced but has also become in practice superfluous. In the interest of uniformity and efficiency it would be a gain if all rights of inspection of persons or property, save such as are commonly exercised by local communities regarding food, water, and disease, were now transferred to the United States. Even local inspection may properly be done away with wherever Federal inspection operates. An incoming passenger from abroad, for example, who has passed the health examination of a Federal quarantine ought not to be subjected to further inspection by State or municipal health officers at the port at which he disembarks.

CHAPTER XVI

GENERAL OBSERVATIONS ON THE STATES

IT will not have escaped notice that the adoption of the various changes which have been proposed in the provisions of the Constitution relating to the States would in general have the effect of limiting still further the powers of the States, and of bringing them to a greater extent than at present under the control of the Federal government. Those who favor a centralized national government may, accordingly, be inclined to look upon all such limitations of State authority as desirable, if indeed they do not feel that the process of restriction should be carried still further. The advocates of decentralization, on the other hand, viewing the States as the main bulwark against Federal autocracy, may see in the proposed changes little more than another attempt to bring about uniformity where the Constitution intended variety, thereby weakening the control which the people may exercise over their government.

The controversy over centralization and decentralization, so far as the United States is concerned, is as old as the Constitution. Each doctrine had

its advocates in the Federal convention of 1787, and each side struggled hard for the acceptance of its theory. The question to-day, however, takes a somewhat different form. The point at issue is not whether, in revising the Constitution, the Federal government should be given as highly centralized a form as the people can be induced to accept, but whether the States shall be held to their constitutional obligations, whether limitations which the Constitution imposes upon the United States should not in certain instances be imposed also upon the States, and whether constitutional recognition should not now be given to certain political and economic facts which have long been matters of common observation. If there be a question as to whether Federal usurpation in certain directions ought not now to be curbed, there is equally a question whether, in certain other directions, Federal usurpation ought not now to be given constitutional sanction.

So long as the States continue to exist, the Federal government can never become highly centralized. The States are not the creation of the United States. It is true that, with the exception of the original thirteen States which adopted the Constitution, every State which has been added to the Union has been admitted by act of Congress, and that Congress may thus be said to have been the instrument by which the State was created or recognized. It has been only an instrument, however, at the most.

Once admitted, a new State has always been regarded as on a footing of equality with all the other States, sharing in the obligations which the Constitution imposes and entitled to all the privileges and the benefits which that instrument grants. It is free to set up any kind of republican government that pleases it, to revise or amend its Constitution as it chooses so long as it does not contravene the Constitution of the United States, and to legislate on any subject which is not by the Federal Constitution reserved to the United States or denied to the States. It cannot withdraw from the Union even if it wishes to do so, although it may temporarily, by rebellion, alter its relation to the Union; and although it is certain to become old, it cannot die. In the theory of American constitutional law a State is as perpetual as is the Union of which it forms an inseparable part.

It is because the State enjoys an independent political life of its own that conflicts of interest between the State and the United States are bound to arise. Were a State, in its relation to the United States, in the position of a municipality, which has no powers except such as the State gives it, or of a territorial department created by Congress for certain administrative purposes, there could be no controversy over rights. The government of the United State would in such case be entirely centralized and the States would do its bidding. But the Constitution not only deals with the States as independent political

societies, but it also leaves to their control a vast and undefined mass of powers which concern intimately the daily life of the people.

When, accordingly, social interests, and particularly economic interests, develop to a point where they are no longer bounded by State lines but become interstate or national, any attempt at continued regulation by the State is not only hopeless, but if persisted in is certain to precipitate a conflict between State power and Federal power. The outcome of such a conflict can never be long in doubt. The greater will prevail over the lesser. Any constitutional peg upon which the extension of Federal control necessary to meet the new situation can be hung is certain to be availed of; and the Federal courts, which always seek to uphold Congress if possible, will stretch the mantle of the Constitution to the limit in order to make it cover the new exercise of Federal authority. There is no remedy for this condition save in such revision of the Constitution from time to time as will take account of the social and economic changes which the country has undergone. It is precisely because, in a country whose economic development has progressed by leaps and bounds, and whose political thought within less than a generation has undergone revolutionary changes, a Constitution adopted more than one hundred and thirty years ago has never been revised, that our constitutional system is now antiquated and threatens to fall wholly into contempt.

Ultimately, of course, the most serious result of Federal usurpation is to be found in its effect upon the moral sense of the community and of individuals. A single illustration will suffice. A serious dispute arises between coal miners and operators over questions of wages, hours, and conditions of employment. It is more than doubtful if the Federal government possesses under the Constitution any power whatever to regulate the wages or labor conditions of any persons who are not Federal employees or who are not engaged, directly, in interstate or foreign commerce. The only authority under our system that can lawfully deal with such matters is the State.

Notwithstanding that fact, however, the President, acting on his own initiative and without any pretence of authorization from Congress, appoints a commission which investigates the situation and proclaims terms of settlement; the Federal courts stand ready to support the President with injunctions against strikes; the Department of Justice floods the coal-mining region with special agents who invade meetings, arrest individual miners, and spy generally upon what is going on; and Federal troops are brought in or held in readiness. Because a stoppage of coal production is a serious injury to the community the public, aided by a press which in general takes the side of the operators, acclaims the proceeding as a triumph for law and order and a demonstration of Federal efficiency.

Morally, however, the outcome is nothing of the

kind. The Federal government has exceeded its powers, and the State by acquiescing has weakened its own authority and prestige. Every time that a State allows Federal usurpation to be carried through without protest it strengthens the popular impression that the State is impotent. The public, on the other hand, applauding the unauthorized interference of the Federal government because a threatened calamity has for the moment been averted, is prone to forget that it has also approved a violation of the Constitution, and to conclude, if it thinks of the question at all, that the limitations of the Constitution are after all of small importance. There can be little doubt but that the general contempt for law which is to-day a regrettable characteristic of American society has been directly fostered by the systematic disregard of the Constitution which the Federal government has increasingly shown, and by the weak submission of the States to Federal encroachment upon their proper sphere. Yet the process of corrupting the moral sense of the people, of confusing even elementary distinctions between constitutional and unconstitutional methods, and of strengthening the vicious notion that the end justifies the means, is bound to go on unless the Constitution itself is revised, and the respective spheres of the States and of the United States are defined in terms suited to present conditions rather than to those of 1787.

The far-reaching effects of Federal usurpation are

particularly apparent when such usurpation enters the field of the police power. Here more than anywhere else, perhaps, the Constitution clearly intended to permit diversity of practice. By its failure to recognize the police power as within the jurisdiction of the Federal government the whole question of the regulation of personal and social relations was clearly left to the States, with the implied liberty of dealing with all such matters in ways that each State might think fit. The various efforts which have been made by the Federal government to regulate prices, wages, conditions of labor, and the conduct of business have been, with few exceptions, invasions of the police power of the States. The right of Federal control over interstate and foreign commerce has, indeed, afforded at times a shadowy justification, and the "common defence and general welfare" clause of the Constitution has been invoked where no other authority could be found. It is becoming apparent, however, that if the constitutional right of controlling interstate and foreign commerce is to continue to be given, either by legislation or by judicial decision or by executive fiat, such extension as it has lately been undergoing, State control over production or distribution of any kind will shortly disappear altogether; while if the "common defence and general welfare" are to continue to serve as a sufficient cloak for anything that the Federal government thinks it well to do, most of the

other restrictive provisions of the Constitution will before long be only a scrap of paper.

The most striking recent invasion of the police powers of the States is to be found in the submission and adoption of the Eighteenth Amendment, prohibiting the manufacture, sale, or transportation of alcoholic liquors as beverages. Nothing can be clearer than that, down to the time of the adoption of this Amendment, the control of the alcoholic liquor industry was regarded as a matter which belonged exclusively to the States under the police power, and that the States were at liberty to deal with the industry in any way that they thought proper. The Federal government appeared as an intervening agent only when alcoholic liquors entered into interstate or foreign commerce under circumstances which threatened the integrity of State laws. But under the guise of a constitutional Amendment for whose ratification the unprecedented period of seven years was specifically allowed, the legislatures of three-fourths of the States were induced to agree to a Federal invasion of their police powers of a sweeping and drastic kind. The Eighteenth Amendment is more than an entering wedge; it is a coach and four driven straight through the reserved constitutional right of the States to regulate their domestic concerns, and a menace to the integrity and political independence of the States as constituent members of the Union.

The general conclusion may be summarized as

follows. Wherever, as the result of political or economic development, any occupation or industry or social activity which is not now clearly within the constitutional control of the Federal government is found to be in fact national or interstate in scope, and hence beyond the power of the State to deal with effectively, the Constitution should be so amended as to give control to the United States. Whatever is not clearly of such a character should be left to the States, and the Constitution should be made as specific in its indication of what is left to the States as in its indication of what is given to the United States.

CHAPTER XVII

THE FEDERAL COURTS

THE judicial provisions of the Constitution are contained in part in Article III, which is entirely devoted to the courts and to legal matters, and in part in numerous other sections scattered throughout the instrument and its various Amendments. The provisions as a whole fall into three main divisions: those which have to do with the organization and procedure of the Federal courts; those which define offences and prescribe penalties; and those which are concerned with certain personal or public rights which, if violated, it would be primarily the office of the courts rather than of Congress or the executive to uphold. A consideration of all three classes of provisions is necessary in order to understand the nature and scope of the Federal judicial power.

The Constitution wisely provides by name for only one court—the Supreme Court. The creation of "inferior courts" is left to Congress, which may "ordain and establish" such courts "from time to time" at its discretion. Congress is thus at liberty to create or abolish inferior courts as the needs

of the country may indicate. There would seem to be no sufficient reason why such liberty should not continue to be left to Congress.

It has already been proposed that, with the substitution of responsible government for the present irresponsible system, the judges of all the Federal courts should be appointed by the Premier and Cabinet, instead of the present method of appointment by the President with confirmation by the Senate. A consideration of this proposal naturally involves an examination at the same time of the existing constitutional provisions under which Federal judges hold office during "good behavior," and are removable only "on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." To intrust to a body which, like a responsible Cabinet, represents political policy the appointment of Federal judges is to ensure, it will be urged, the selection of judges for political or partisan reasons, thereby impairing public confidence in the integrity if not in the ability of the courts. The reply to this objection, which with many persons undoubtedly has great weight, necessitates a comparison of the Federal courts as they exist in the theory of the Constitution with the same courts as they exist in fact.

It was, no doubt, the intention of the framers of the Constitution to create a Federal judiciary as far removed as was humanly possible from political bias or partisanship. To this end the judges were to be

appointed by the President with the approval of the Senate, instead of being nominated or chosen by Congress or by either house, or chosen by the State legislatures, or elected by the people. Once appointed and confirmed, they were to hold office during good behavior—a phrase which in practice was interpreted, as it has been interpreted in England, as implying tenure for life; they were shielded from coercion by the provision that their compensation should not be diminished during their continuance in office; and they were protected against removal save by the process of impeachment, and then only for treason or other grave offences. Secure in their seats they would, it was believed, have no other motive than to interpret and apply the Constitution according to the recognized principles of jurisprudence, restraining both Congress and the executive in case either of those departments of government overstep their constitutional limitations, and ensuring the development of what the Constitution of Massachusetts describes as "a government of laws and not of men."

Neither in theory nor in practice, however, has the arrangement worked out in that way. From the beginning of the government partisan considerations have played a large part in the selection of Federal judges. Washington saw to it that the first Supreme Court was safely Federalist; and while the long tenure of judges has sometimes caused the Supreme Court to retain a different political complex-

ion from that which characterized the executive or Congress, appointments to fill vacancies have always been made either from the ranks of the party in power or in obedience to a recognized spoils system under which the minority party was to be accorded a certain representation. The same political considerations have obtained in even greater degree in appointments to the inferior courts. Presidential selection and senatorial approval have not ensured a nonpartisan judiciary.

There is no reason why they should have done so. The conception of a judiciary which has commonly been based upon such a phrase as "a government of laws and not of men" is essentially false. Law is not a fixed body of rules and doctrine resting upon principles which are unchangeable. There are few legal principles which, in their application to concrete cases, are the same yesterday, to-day, and forever. Law is a living thing. Its principles change with changes in human experience. What would have been confiscation in one age appears as a high social propriety in another. Penalties generally approved at one period are looked upon as cruel or useless at a later time. Personal rights once regarded as of the very essence of individual liberty disappear altogether as some later conception of the common welfare emerges. Law, which is only the formulated expression of the opinion of the community, must change as opinion changes, otherwise it ceases to command confidence and respect. It can-

not exist in effective form, it cannot ensure the rights which it is its peculiar business to explain and apply, it cannot help public opinion to clarify itself and work toward good ends, if it shackles itself with precedent and lives in an atmosphere apart.

So far, therefore, as the selection of Federal judges by a responsible Cabinet is concerned, there is nothing in the proposal that should excite alarm. The control of policy which is now exercised by the President would, under the system which has been suggested, pass to the Cabinet; and there is little reason for anticipating that political influences in judicial appointments would operate more strongly in the latter case than in the former. Any political party that is in power will always wish to have its general view of national policy represented on the Federal bench; and it will, accordingly, when vacancies are to be filled, choose appointees who are known or believed to be of its way of thinking. The procedure is a natural one, and in any case there is no way to prevent a dominant party or party group from following it. The safeguard for the public is in the fact that whereas, under the present system, an obviously unfit appointment may be made by the President without opportunity for popular rebuke, the Cabinet would be as responsible for its judicial appointments as for its other acts. A bad appointment to the bench or an uncalled-for removal could as easily be made an occasion for censuring and unseating a Cabinet as could any other Cabinet

action of which the majority in Congress disapproved.

The same reasons which dictate the appointment of Federal judges by a Cabinet which represents policy dictate a corresponding change in the existing constitutional conditions which govern removal. At present, as has been said, appointments to the Federal bench are for good behavior—practically for life—and removal from office is possible only through impeachment on account of treason, bribery, or other high crimes or misdemeanors. The constitutional provisions take no account of any grounds of removal which do not themselves constitute recognized legal offences for which any individual, and not alone judicial officers, may rightfully be punished. They do not cover such things as incompetency, undue political partisanship or bias, or a hopelessly reactionary attitude toward public interests. Yet it must be obvious that a judge whose decisions are widely questioned on legal grounds by competent lawyers, or whose point of view regarding social questions is that of a generation which the progressive thought of the nation has left behind, is as little entitled to retain his office as would be a judge who plotted against the government or accepted bribes. The sin against the community is at least as great in the one case as in the other.

A proper relation between Congress and the Federal judiciary would be established by providing, first, for the appointment of judges by the Cabinet with-

out confirmation by either house of Congress; and, second, for tenure during good behavior subject, however, to removal either by impeachment or at the request of the Senate and the House of Representatives. A tenure which normally ran through good behavior would ensure all the advantages of extended service, freedom from coercion, and absence of inducements to commend oneself for reappointment, which a judiciary ought to possess and which the present Constitution affords. On the other hand, while impeachment would still be available for the particular class of offences to which the process applies, removal upon the request of both houses of Congress would make possible the retirement of a judge whose conduct on general grounds was unsatisfactory, but against whom no specific charges of misconduct could be lodged. Removal on general grounds of unfitness, without preferral of specific charges of illegal conduct, is a recognized procedure in the executive and political departments of government and in civil life, and no reason is apparent why Federal judges should be exempted from its operation. The safeguard again is in the political responsibility of the Congress and Cabinet that vote the removal.

The proposal that Federal judges should be chosen by popular election for fixed terms, and should not in any case be appointed or be given an indefinite tenure, ought not to be passed over without mention, partly because the plan has more than

once been advocated, and partly because of the precedents for it in the practice of the States. The most serious objection to the popular election of judges is not the one which is most commonly urged, namely, that it would endanger the integrity and independence of the courts if judgeships were to be schemed and scrambled for at conventions, at primaries, and at the polls. That evil would undoubtedly exist in the Federal sphere as it notoriously exists in the sphere of the States. As has already been pointed out, however, political partisanship cannot be entirely banished from judicial circles whatever the method of choosing judges may be. Popular election would magnify partisanship but would not create it.

The chief objection to choosing judges by popular vote lies in the fact that a judge, in addition to any other qualifications, must possess certain technical knowledge and experience. However high his character, however sound his general intellectual equipment, however wide his acquaintance with business or public affairs, he must also possess a technical knowledge of law and of legal procedure. To ask the public at large to pass upon a question of technical fitness in the case of a lawyer is as inappropriate as it would be to ask for a similar judgment regarding the technical fitness of an engineer or a doctor or a musician. The popular election of judges in the States does not prove the contrary, for the reason that our elected State judiciary is not, and

never has been, as a whole of a high order. State experience merely shows at the best that able men occasionally find their way to the bench even under very unfavorable conditions. The determination of technical fitness is obviously a task in which only a comparatively few persons can helpfully take part. If, as under the system just proposed, the body which makes a judicial appointment is itself responsible to the people, one may anticipate that reasonable care will be taken; for while the people at large are not in a position to decide wisely as to which of several candidates is likely to make the best judge, they are not without ability to appraise the fitness of a judge once his work is spread before them.

Finally, it may be pointed out that the selection of Federal judges by a responsible Cabinet, subject to removal on general grounds by a joint address of the two houses of Congress, is necessary if the Federal government is to possess the indispensable quality of unity. The seat of authority in government is in the people, acting through freely-chosen representatives to whom are intrusted certain powers, but over whose use of those powers the people retain constant and immediate control. Such a system does not exist in the United States, and cannot exist so long as the Constitution retains its present form. Even if the executive and legislative departments were transformed from their present irresponsible character to a condition of real responsibility, unity would still be lacking if the same principle of

responsibility were not extended also to the judiciary. The vice of the Federal judicial system is not that the courts lack ability, sincerity, or devotion, but that they are irresponsible. Appointed for life by a President who is himself irresponsible, and removable from office only upon conviction of crime, they are in practice as free from accountability to the people whose rights they are sworn to uphold as was ever an hereditary monarch. They are charged with the high responsibility of interpreting and applying the law of the land, but they nevertheless are in no way bound by any expression of public opinion save that which voices itself remotely in a constitutional amendment.

It should be the function of the courts to interpret the Constitution and the laws in the light of public opinion. No living and progressive government can be "a government of laws and not of men"; the truth of the matter is exactly the reverse. If government by public opinion rather than by fiat of the few is ever to be set up in the United States, it can only be when the courts, as well as Congress and the executive, shall have been given a responsible character. There will always be rules to be observed and principles to be applied. The essentially conservative nature of law will not disappear merely because the courts are brought within the scope of popular control. There need be no fear that judicial decisions will be erratic, that every passing whim of popular fancy will instantly meet with

judicial approval, or that the courts will be terrorized through fear of being remade. There will still be a Constitution to construe and apply, there will still be sound doctrine and wise precedent to observe. What may be anticipated, however, is that the courts will cease to be bulwarks of reaction and supporters of technicalities. It is necessary that the courts should recover the popular regard which has been increasingly withdrawn from them. They will do so only when they are so reconstituted as to be, in unity with the executive and legislative departments, organs in fact as well as in name of the people and servants of the people's will. Not in their own name as supreme and final arbiters, but jointly with the executive and Congress as representatives of the people, must they expound the law. There are but two other alternatives. The one is judicial tyranny, the other is revolution.

CHAPTER XVIII

JURISDICTION OF THE FEDERAL COURTS

SAVE in one or two important respects, the provisions of the Constitution which have to do with the jurisdiction of the Federal courts are not in need of revision. Drawn for the most part on broad lines, they mark off clearly the field of Federal jurisdiction from the field which is reserved to the States. The judicial power of the United States extends to all cases in law or equity arising under the Constitution, Federal laws, or treaties; to all cases affecting ambassadors, other public ministers, or consuls; to all admiralty or maritime cases; to controversies to which the United States is a party; to controversies between two or more States, or between a State and citizens of another State or between citizens of different States; and to controversies between citizens of the same State claiming lands under grants of different States, and between a State or its citizens and foreign States, citizens, or subjects. Whatever controversies do not fall within the limits of these several specifications are by inference reserved to the States.

In the distribution of jurisdiction the Supreme

Court is given original jurisdiction—the authority, that is, to try the case in the first instance—only in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party. In all other cases the Supreme Court has appellate jurisdiction only; that is, the case must first be passed upon by an inferior court before it can be examined by the Supreme Court for final judgment. As the cases in which the Supreme Court is given original jurisdiction have never been and are not likely to be numerous, it follows that most of the cases which come before that court are carried to it on appeal. It was apparently not the expectation of the framers of the Constitution that any large proportion of the cases brought in the lower courts would be appealed; but the increasing tendency to bring suits in Federal courts rather than in State courts whenever a Federal issue can be raised has greatly overcrowded the Supreme Court with appeal business, and enormously increased delay and cost in litigation.

The pressure upon the existing Federal courts would be materially relieved if the Constitution were to be so amended as to provide for the creation of administrative courts, with exclusive jurisdiction in cases involving Federal administrative law. The present situation with regard to purely administrative questions is anomalous. Federal statutes relating to such matters as tariff duties, internal taxes, and transportation rates present in the nature of the

case numerous questions of interpretation or classification which call for judicial decision. Such questions rarely involve, however, any constitutional issue, and indeed seldom touch the larger aspects of law at all. What is involved is, as a rule, only an authoritative decision in regard to procedure. How chemical products or items of personal income, for example, shall be classified for purposes of taxation seldom involves any consideration whatever of the Constitution. At present, however, such controversies, if they are of a nature to be brought before a court, must be brought before Federal judges few of whom have the technical knowledge requisite for dealing with them, and whose judicial training has been mainly in other fields.

The failure to provide for administrative courts when the Constitution was framed is easily explicable, because there were at that time hardly more than the first suggestions of a Federal administrative system and no administrative law. But now an elaborate structure of Federal administration has been built up—customs, internal revenue, banks, transportation, public health, immigration—it is time that administrative courts were created to deal with administrative controversies. The jurisdiction of such courts should be strictly limited to administrative questions, but as to those questions their jurisdiction should be exclusive and their decisions, of course, final. By providing for a supreme administrative court with appellate jurisdiction only,

and such inferior or district courts as Congress should from time to time create, litigants would be assured of the same opportunity and the same protection that are now enjoyed by litigants in courts of law, and a more prompt adjudication of their claims than is now possible. Not the least of the advantages of such a change would be the recognition of administration as a distinct phase of national government, and the working out of a system of administration adapted to American conditions.

The creation of administrative courts would also operate to bring under competent judicial control an executive practice which in recent years has not only gone to extraordinary lengths, but has also entailed notorious abuses. At the present time the Federal executive departments—Treasury, Interior, etc.—are in the habit of issuing so-called executive orders or instructions which for most practical purposes have the force of law. On their face, of course, such orders usually assume to be nothing more than interpretations of particular statutes or directions for applying their provisions, intended for the information of the public or the guidance of officials upon whom the enforcement of the law in question devolves. Not infrequently the statutes themselves authorize or direct the issuance of such instructions. A familiar illustration is the elaborate directions and regulations issued by the Treasury Department for the collection of the income tax.

In so far as such executive orders are limited

strictly to the requirements of the statutes with which they deal they are, of course, unobjectionable, and would continue to be issued if administrative courts were set up. The abuses of the system have become such, however, as to need curbing. The Postmaster-General, for example, asserts a right not only to exclude from the mail newspapers or other publications containing matter regarded by him as politically objectionable, but also to extend the prohibition to future issues not yet printed. In this extraordinary claim he seems to have received the support of the courts. Executive orders based upon no statutes, but embodying merely some departmental view of "public policy," have been issued and enforced. Were it possible in every case to bring action against such orders in the courts the citizen would enjoy a certain measure, albeit a slow and costly one, of protection against administrative tyranny; but the Federal courts cannot always be relied upon to consider a case which involves an exercise of executive discretion, and in some instances they have held that the decision of an administrative officer, even where questions both of fact and of law are involved, cannot be reviewed by the courts at all.

A system under which the head of an executive department or bureau, holding no mandate from the people and responsible only to an irresponsible President, may combine in his own hands legislative, executive, and judicial powers should certainly be

done away with. If administrative courts were created, not only would many questions upon which executive departments now pass become a part of the business of the courts, but all such administrative orders as would still be issued could be made subject to judicial review. The exercise of official authority would cease to go on uncontrolled, and the individual who was aggrieved would be assured of suitable judicial remedy.

There remain to be considered three points at which the authority and the policy of the Federal courts have been of late the subject of attack. The first has to do with the control which the courts exercise over receiverships. The second relates to what is familiarly known as "government by injunction." The third concerns the right of the courts to declare an act of Congress unconstitutional.

It is matter of common knowledge that a very large number of business corporations, representing a considerable variety of commercial, industrial, or transportation enterprises, have in recent years, for various reasons, become bankrupt and have been placed by the Federal courts in the hands of receivers. The duty of the receiver is to administer the property or business, under the direction of the court, for the benefit of its owners or of the public, with a view either to paying its debts in whole or in part and bringing its operations to a close, or else to reorganizing it so that it may become a "going

concern." In the case of railways and other public utilities, considerable numbers of which are at this time in receivers' hands, it has usually been incumbent upon the receiver to keep the business going in order that the public might not be injured, even though the outlook for profitable operation at any time in the near future was dark.

The original purpose of a receivership was the simple and obvious one of affording legal protection to property and to the public by dealing as equitably as possible with the affairs of a bankrupt concern. In practice, however, the court has become the manager of the business. To-day, in all parts of the United States, Federal courts are engaged in operating railways, municipal transportation systems, mines, factories, and various other business enterprises. They pass upon questions of administration, service, and personnel, supervise accounts, authorize bond issues and sales of property, and intervene in controversies with employees and labor unions over wages and working conditions. They are as truly the business managers of the properties or enterprises which they are judicially guarding as if the judges bore the title of president or superintendent. The receiver, while indeed performing most of the routine duties of a general manager, enjoys in fact less and less discretion and in important matters often enjoys no real discretion at all.

It should need no demonstration that none of these business functions is the proper duty of a court.

The functions are legal matters only in the general way that every affair of life is more or less remotely affected with a legal character. The personal training and qualities which they demand are those of the business man, not those of the judge. The proper object of a receivership is not to substitute judicial management for business management, but to replace a bad or an unsuccessful business management with a good or better one. The assumption by the courts of managerial duties involves, accordingly, a perversion of the judicial function from which the courts as well as business suffer. The situation becomes particularly unseemly in labor controversies, where the attitude of the court, itself beyond the reach of either executive or legislative control, may make impossible either a sensible consideration of the points in controversy or a peaceable settlement of the dispute. The spectacle of a Federal judge, in a strike of employees of a railway which is operated under a receivership, publicly denouncing the strikers, bandying epithets with counsel for the labor unions involved, and refusing to arbitrate the questions at issue save upon conditions which he himself should lay down, goes far to bring the whole judicial system into contempt.

The Constitution should be so amended as to make clear, as it does not in its present form, the limits of judicial power. From the beginning of the government it has been generally assumed that the Federal judiciary should not usurp either execu-

tive or legislative functions. It is now necessary to make clear that the judiciary is not entitled to assume purely business functions, and that the virtual conduct of business of any kind is not a judicial affair.

The objection to "government by injunction" rests upon a different basis. In the case of a receivership it is proper that the court should take the property out of the hands of those who have failed to manage it successfully, and intrust the management to persons who presumably will do better. The evil arises when the court itself, by the control which it exercises over the receiver, becomes virtually the manager of the business. The use of the injunction, on the other hand, has come to involve an extraordinary extension of judicial authority into fields which neither the Constitution nor any sound principles of law ever intended that the courts should invade.

The purpose of an injunction is the simple and obvious one of preventing, either temporarily or permanently, the performance of some act which is either believed to be illegal or which, whether illegal or not, would if performed jeopardize or injure the rights of individuals or of the public. It is essential to the legal use of injunction that the person or persons against whom it is directed, whether individuals or a corporation, should be legally responsible for their acts; that the nature of the action which the injunction aims to prevent should be clearly known and not merely presumed; that the nature of the injury which may be done if an injunction is not is-

sued should be as clearly recognizable by law as is the nature of the action which the injunction aims to prevent; and that the danger should be imminent.

What the Federal courts have done with increasing frequency in recent years is to extend the injunction to cases to which these elementary principles do not apply. The injunction has repeatedly been used, for example, to prevent strikes. The objections to its use in such cases are fundamental. The men and women who work for an employer have collectively no legal character whatever. No legal process of any kind can by any possibility be rightfully applied to them as a body. They are simply a part of the community which happens to be engaged in a particular occupation at a particular place, and which has as much right to abandon the occupation at that place individually or collectively as it had to engage in it, or as any other members of the community have with respect to any other occupation. The attempt to prevent them from striking by issuing an injunction against them is not only an unwarranted invasion of their fundamental rights as citizens, but also involves the assumption that an order of court may properly be directed to people in general, notwithstanding that people in general cannot by any rightful process be made legally responsible for anything. Moreover, to the extent to which an injunction prevents employees from striking it actually operates to compel them to work, thereby creating a species of involuntary servitude, which the Con-

stitution forbids except as a punishment for crime, in the form of forced labor. Not until recently, when employers have systematically invoked the power of the courts against the demands of employees, has it ever been held that an injunction could properly be used to punish anyone for doing anything. The only proper use of an injunction is to prevent something from being done.

The perversion of the writ of injunction to improper uses is equally evident when the writ is employed, as it has been employed of late, to prevent the holding of public or quasi-public meetings, or to prevent the meeting of organizations, or to prevent particular persons from addressing such meetings on particular occasions or at any time in the future. Such use of an injunction not only places the courts in the position of judging of the character and effect of an action before the action has been performed and when the details of its performance cannot be known, but also, especially when the executive branch of the government coöperates, opens the way to gross infringements of the constitutional rights of assembly, petition, and free speech. It ceases to regard the citizen as a reasonable being who is to be punished only when he does wrong, and treats him as at heart an enemy of the government, liable to work mischief if he is not restrained. Such an attitude on the part of the courts is a grave affront to the people at the same time that it undermines respect for the courts themselves.

The only sound way to cure the evil of government by injunction is by a constitutional amendment taking away from the courts the power of so abusing their authority. The Constitution is silent at present regarding the kind of writs which the Federal courts may issue, and the matter accordingly is regulated by statute. It should be put beyond the power of Congress, however, even if that body were given a responsible character, to authorize an action which is so clearly contrary to the public interest as is the use of the injunction in the way here complained of; and the only way to do that is to make the prohibition a part of the Constitution. The effect would be to free the people from oppression at the same time that the courts were freed from odium.

The third point to be considered is the right of the Federal courts to declare an act of Congress unconstitutional. It is urged that a measure which has received the assent of a majority in each house of Congress and has been approved by the President ought to be presumed to represent the matured opinion not only of Congress and the President, but also of the people whom they represent; that Congress and the President, as well as the courts, are sworn to uphold the Constitution and should not be presumed to have violated it knowingly; that constitutional objections, if there are any, to a measure are likely to be fully considered in the course of debate; and that both the Senate and the House con-

tain as a rule able lawyers whose opinion regarding the constitutionality of a proposed measure is at least as sound as that of any court. For a court to set aside as unconstitutional an act which has passed such scrutiny is felt by many to amount to an unwarranted defeat of the popular will—a defeat which is likely to be the more keenly felt because of the general impression that the courts, if not reactionary, are much more conservative than the legislature and less sympathetic with progressive public opinion.

Those who share this view would take from the courts the power to declare an act of Congress unconstitutional, and by inference vest that power in Congress or in Congress and the President acting together. Every act of Congress to which the President gave his approval would be *ipso facto* constitutional. The function of the courts would then be limited to interpreting or applying the act wherever its provisions were doubtful, and to harmonizing it with previous acts with which it appeared to be in conflict. This is the position of the courts in Great Britain, where every act of Parliament is assumed to be constitutional; and this would be the position of the Federal courts of the United States.

It is true that the right of a court to declare an act of Congress unconstitutional is nowhere set forth in the Constitution, and that it is to be found, if found at all, in what have come to be classed as the implied or resulting powers. The foundation of

the right, however, is in the nature of the American Constitution. What is called the British Constitution is not a single document as in the United States, or a collection of a few fundamental acts as in France, but a vast aggregation of statutes, judicial decisions, principles, and usages, partly written and partly unwritten, which during centuries of development have come to be regarded as the law of the land. Every act of Parliament is of the nature of an addition to, a species of interpretation or amplification of, this undefined mass of rights, privileges, obligations, and prohibitions. The only action of Parliament, accordingly, that conceivably could be regarded as unconstitutional would be one involving so distinct or gross a violation of accepted usage as in itself to threaten, if indeed it did not actually involve, revolution. The task of the British courts, in consequence, is the comparatively limited one of interpretation and application. It is their business to give to an act of Parliament its place in the elaborate and elastic structure of laws and precedents of which the British Constitution consists.

The situation in the United States is entirely different. Here, the Constitution is a single written instrument. The document is brief, and many of its most important provisions are stated in brief and general terms. By this Constitution, however, all Federal legislation as well as all other acts of the Federal government are to be tested. The only

laws which can form a part of the "supreme law of the land" are those "which shall be made in pursuance" of the Constitution—that is to say, in harmony with it. The Constitution itself, moreover, is beyond the reach of either Congress, the President, or the courts; neither can alter or amend it, and the individual members of each are sworn to uphold, protect, and defend it. The only power that can change it is the people, acting either through a convention called for the purpose or through State legislatures or conventions to which specific amendments are submitted.

The function of the courts, accordingly, is clear. The judicial power is declared by the Constitution itself to extend to "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority." One of the questions which may at any time "arise" is whether or not an act of Congress is in harmony with the Constitution; and that question the courts, as the repository of the judicial power of the people, must decide. The decision cannot be left to either Congress or the President or to the two jointly, because the Constitution expressly vests the judicial power in the courts. The courts must continue to exercise that power if the Constitution itself is not to be set at naught. So long as there is a written Constitution to which the acts of Congress must confirm, so long must the test of conformity be applied by the department

of the government which the people have created for that purpose. Nor would the obligation be lessened if the Constitution were to be so amended as to provide for a responsible government. The Constitution would indeed be changed in form, but it would still stand as the fundamental law.

The demand for the abolition of the right of the courts to declare an act unconstitutional has its origin chiefly in the widespread feeling that the courts are too conservative or plainly reactionary; that they are, in popular phrase, behind the times. The truth of the criticism is not, unhappily, wholly to be denied. But the remedy does not lie in depriving the courts of a power which the Constitution, by the essential nature of the principles which it lays down, unquestionably confers upon them. The remedy is to be found in the establishment of responsible government where the Constitution now establishes or encourages irresponsibility, in the closer relation between the courts and Congress through provision for the removal of judges upon an address by both houses of Congress, and in the better quality of public opinion which may be expected to result when the control of the Federal government is taken out of the hands of those who hold the offices and given to the whole people to whom control rightfully belongs.

CHAPTER XIX

REVISION, NOT AMENDMENT

THE reader who has followed attentively the discussions to which the previous chapters have been devoted must by this time have realized that the attainment of the constitutional reforms which have been urged is not possible by any process merely of amending the Federal Constitution. Some of the reforms which have been indicated are, no doubt, attainable in that way, just as other reforms deemed necessary or desirable at the time have been attained by amendment in the past. In proposing a general revision of the Constitution for the purpose of adapting the form of the national government to the obvious and undoubted needs of the present day, no reflection is intended to be passed upon a process of improvement which has been already ten times resorted to. The mere fact that the Constitution itself provides for change by a process of specific amendment is alone sufficient to entitle that process to respect.

Nor is it to be assumed that were the Constitution to be revised as a whole in accordance with the proposals which have been made, or with others,

and the nation set forward again with a Constitution in every respect better than the one which it now possesses, the process of specific amendment could thereafter be wholly dispensed with. Any form of government that is a living rather than a dead thing will always be in need of adaptation to new conditions and changing circumstances, and the process of amendment must go on so long as the nation itself continues to grow.

What is apparent, however, is that none of the fundamental changes which have been urged can be effected by any process of mere amendment. Constitutional amendments, however wisely framed, can at best deal only with details of the constitutional structure, making good an omission here, remedying a defect there, adding something particular which the developing life of the people has come to regard as necessary. But the general nature of the constitutional system and the form of government which gives expression to it remain alike untouched. No one of the nineteen Amendments which have been added to the American Federal Constitution in the one hundred and thirty-two years since that instrument went into effect has altered in any respect whatever the fundamental character of the American federal system, or given it a flexibility or adaptability in the face of changing conditions which it did not originally possess. The roof has been patched, one or two doors and windows have been added and others closed, and some more or less fantastic decor-

ation has been put on here or there, but the building is the same as that into whose possession the nation entered in 1789.

What confronts us now is the fact, plain enough to any one who cares to look at it without prejudice, that the building has been outgrown. The Constitution is no longer adapted to our needs. After-dinner orators may still praise it as, in Gladstone's imaginative description, the greatest work ever stricken off at a single stroke by the mind of man. The courts may still cloak the violence of some of their interpretations by appeals to precedents and general principles which they themselves have fastened upon it, and which they naturally think cannot be abandoned or modified without disaster. Friendly foreign observers may continue to see in it excellencies and safeguards which they do not perceive in their own constitutional systems. But the fact remains that in a time of revolutionary change so far-reaching in its implications that even the wisest dare not say how much of the existing social order will survive, the political and economic life of the American people is bound by the rigidities and antiquated prescriptions of a Constitution which not only does not leave them masters of themselves, but actually denies to them in important respects the inherent right to exercise their will at all. It is from this constitutional bondage, at once dangerous and indefensible, that enlightened public opinion in the United States is to-day struggling to es-

cape, and the only escape is through the establishment of a new national Constitution.

The reasons which dictate a general revision of the Constitution at this time have already been discussed in connection with the various propositions of change which have been set forth, and they need not be recapitulated here. Certain objections to a general revision which are likely to be urged, however, are entitled to be examined. Some of these objections will probably appeal most to lawyers and judges, to large business interests which constantly seek legal advice in the conduct of their affairs, and to students of political and constitutional questions generally. Others are likely to be raised chiefly by the larger public which, while interested in a general way in progress, is measureably content with the freedom which it enjoys and sees no necessity for anything more than a specific amendment here or there. A third group of objections emanate from that very considerable portion of the community which instinctively dreads political or social changes of any sort, and sees in a proposed revision of the Federal Constitution an invitation to foolish or dangerous experiments.

To put the matter in another way, one class of objectors may be inclined to oppose revision on the ground that the results will not be good, and that the last state of the country may in consequence be worse than the first; another may draw back because the proposal does not interest it; while a third

may even lean toward positive opposition from fear lest revision and revolution should turn out to be in substance one and the same. It is proper to give full weight to all of these objections, however well or ill they may be founded. A national constitution, whether framed *de novo* as in the case of a newly-created state, or attained by a process of revision as in the case of a state which has already enjoyed a constitutional government, is, or at least ought to be, the conscious and willing act of the whole people; and no phase of public opinion, even if prejudiced or apathetic or openly hostile, should be ignored in framing the instrument under which the nation is henceforth to live.

One of the objections which is likely to be urged most seriously to a revision of the Constitution is that any such violent break with the past as is involved in a change in the fundamental character of a constitutional system is presumptively bad because, so to speak, it tears up the national life by the roots and transplants it to a strange soil where the prospect of growth and fruitfulness is at best doubtful. Granted, one may argue, that the Constitution of 1787 is too rigid, that it does not facilitate government by public opinion, and that many of its specific provisions now seem ill-contrived, such is nevertheless the system to which the American people have long been habituated, and under which they have admittedly attained a high degree of prosperity and a position of influence in world affairs.

Imperfect as the Constitution may be—and it may well be doubted if there are many competent and unbiased observers to-day who regard the American Constitution as other than a very imperfect scheme of government, such as by no possibility would be set up if the work were to be done again—it nevertheless has molded the political thought of the people, accustomed them to certain uniform habits of political procedure, and given them, more than any other single influence has given them, a feeling of national solidarity. To replace this system with another radically different, however good the new system may be in itself is to ask the people to orient themselves in a new political atmosphere, to master strange and unaccustomed forms of political action, to think in terms to which they are not used. Will it not turn out, therefore, that such a Constitution, born of no deeply-felt need and connecting itself with nothing vital in the nation's past, must remain an alien form, lacking either the moral appeal which awakens devotion or the intellectual appeal which deepens the consciousness of growth?

The objection would have more force if there were in the United States to-day any such general regard for the past or any affection for the Constitution as an historical document or a source of national greatness as the argument assumes. That such feeling or affection is in fact, however, neither widespread nor notably influential hardly requires

demonstration. What may still be true to some extent of the original thirteen States, all of them on the Atlantic seaboard and four of them in New England, or to an appreciably less extent of some of the older States of the central West which entered the Union before 1825, is hardly at all true for the rest of the country. Fully one-half of the States of the Union have little or no tradition, either in the circumstances of their admission or in the subsequent events of their history, of the conditions under which the Constitution was framed or of the controversies to which its adoption gave rise. The history of the early years of American national life is indeed everywhere taught in the schools, but less and less time will be found to be spent upon the period of beginnings as one passes westward from the Atlantic coast. The successive waves of migration which have now covered the entire country with a relatively dense population have emphasized novelty and adventure and practical adaptation to circumstances far more than they have emphasized historical continuity. It would certainly be difficult to show that the millions of American citizens of foreign descent who have contributed to the development of the national resources and the enrichment of the national life are deeply stirred, or in practice particularly affected, by the thought of a national past of which neither they nor their ancestors were a part. A common devotion to the Union and its welfare one finds, happily, everywhere, but its roots

lie far more in the present and the future than in the past.

More indicative still of the national temper are the outspoken criticism of American political institutions and the frequent proposals in Congress and elsewhere of constitutional change. No invincible regard for the past is shown, for example, by the repeated demand for the election of President and Vice-President by direct popular vote, or for the popular election of Federal judges, or for seats in either house of Congress for members of the Cabinet, or for a popular referendum on Federal laws, or for far-reaching Federal control of industry, business, or natural resources. Any one of these constitutional proposals, if adopted, would admittedly work a more or less radical change in the structure and theory of the Federal government, but that fact, far from checking public discussion, may be said rather to stimulate it. It is, indeed, a characteristic of present-day political debate in the United States that surface remedies for recognized ills are more and more peremptorily dismissed in favor of constitutional changes which go, or at least are thought to go, to the roots of the difficulty. Instead of evincing concern lest historical continuity should be broken, there is abundant indication of concern lest, in spite of every exertion, an outgrown constitutional system, strengthened by the support of interests which find profit in maintaining it, shall continue to hold the people in its grip.

In other words, instead of finding that regard for an historical past acts as a restraining influence, it is rather the limitations and deficiencies of the past from which American public opinion to-day is consciously seeking a way of escape. It is because a long experience has made clear the essential nature of the Constitution that large numbers of people are willing to contemplate without fear a Constitution of another kind. If the last decade in particular has shown that the Constitution can with no great difficulty be amended when amendment is desired, it has also shown that amendments alone cannot change the nature of the system. No conceivable form of amendment which would not be in effect an entire recasting of the Constitution can give to the United States a responsible government or enable the people to register their will promptly and effectively. No amendment can limit the governing power of the Federal courts, as it should be limited, unless the legislative and executive departments of the government are also reconstituted. The election of the President by popular vote, while undoubtedly an improvement upon the present system, would not establish responsible government or make the President any less an autocrat. If we have not yet exhausted the resources of the amending power, we have at least learned by experience what the amending power cannot do.

It may still be objected, however, that a general revision of the Constitution, being in the nature of

the case far more elaborate and comprehensive than any number of specific amendments, would upset the time-honored political life of the nation and launch it upon a stormy period of doubtful experiment. To admit the objection would be to reject altogether the possibility of fundamental change, and deny the right of the people to change their Constitution if they so desire. The Declaration of Independence does indeed point out that "prudence will dictate that governments long established should not be changed for light and transient causes," and that "accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." But the same Declaration also declares that "whenever any form of government becomes destructive" of the ends for which governments exist, "it is the right of the people to alter or to abolish it and to institute new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." No risk could now be greater than was run by the American colonists who in 1776, acting upon this principle, declared their independence of Great Britain. It would indeed be a reflection upon the character and ability of the American people if, with nearly a century and a half of political experience to their credit, they should draw back from an experiment which the fathers dared

to make, and should hesitate through fear of failure to establish a government which in fact and not merely in name should "derive its just powers from the consent of the governed."

The appeal to historical continuity is by no means one lightly to be dismissed. We are what we are as a nation because of what we have been. Public conduct, like private, owes more to precedent and long-continued usage than to general principles. No nation should lightly break with its past, none can so break even soberly without sacrificing something which it has come to value and without incurring certain risks. But the argument from the past is too often the recourse of those who have vested interests or of those whose business or professional careers appear to be bound up with the existing order of things, to make it wholly void of suspicion. It is the favorite argument of the rich, of the powerful, of those whose families have been long in the public service, of conservatives who insist that nothing that is good in government can be new. It is the time-honored refuge of the timid and the weak, and the familiar device of the obstructionist. It is, in short an individualist argument, dear to the hearts of all who believe that the business of government should always be in the hands of the "best men," and that the only safe changes are those which come gradually and in detail. But it is rarely the argument of the people, of that overwhelming mass of the community whose chief concern with government

of any kind is the aid which it gives in the attainment of a common happiness, security, and opportunity. It is just because the people have at last discovered, what many observant individuals have all along known, that the present Constitution of the United States does not vest the control of government in the people themselves, and that "the consent of the governed" is in fact an empty phrase, that they are demanding another system and are willing to face the risks which its adoption may involve.

The objections of those who on general principles are opposed to governmental changes of any kind need not long detain us. The persons who take this view are as a rule either such as rarely have occasion to give much thought to the subject of government, and who consequently feel only a languid interest in the question; or such as, for one unimportant reason or another, are content with things as they are. That this class at any given moment is numerous, and that its votes would count heavily in the scale if they were all cast upon one side of the question, is probably true. Yet the existence of such a feeling in the country is by no means an insuperable obstacle to reform. Indifference to political problems is to a considerable extent a question of circumstance. So long as an issue is not directly raised, those who are fully occupied with the task of earning a living and performing their daily duties as members of society are under no necessity of taking sides; while if the grievances of their own exist-

ence are not too acute, they may well feel that the existing government, which is the only one they know, is doing as well as can be expected.

Once the issue is raised, however, the most indifferent or self-satisfied voter is likely to show himself entirely capable of evincing intelligent interest, weighing arguments, and making up his mind. The fact, accordingly, that a respectable number of persons at the present moment might look upon a revision of the Federal Constitution as a visionary proposal having no practical importance is no proof that they would all unite in opposing the proposition if they were called to vote upon it. The worst that could happen would probably be that they would need to be informed, interested, and organized in order to secure their support; and that, it may be observed, is not a condition unfamiliar in elections generally nor one with which the advocates of reform have usually neglected to cope. It is not correct to say that American voters are indifferent to fundamental issues. What they are indifferent to, and rightly, is issues which they know to be superficial or formal, and to a political procedure in which they play no vital part.

There remains to consider the objection that a general revision of the Constitution would open the way to the introduction of fantastic or dangerous experiments in government. To those to whom this objection appeals the Constitution takes the form of a bulwark against revolution, a solid and

wise obstruction in the way of those classes in the community whose capacity to govern is often thought to consist chiefly in their outspoken dissatisfaction with the existing constitutional system. Especially at the present moment, when governments everywhere are being attacked and every sort of revolutionary theory is being discussed, the summoning of a constitutional convention, it is urged, might well precipitate a crisis not only in the United States but in other countries as well. It would be better to wait, one is told, until the air has cleared a little and the world has settled down, until the task of social reconstruction which the war made necessary has been more fully carried out, before attacking either the foundations or the superstructure of one of the oldest and most stable governments in the world.

If the purpose of revision were merely to substitute the rule of one class for the rule of another, there would be little to be said in favor of it. All class rule government is bad—bad in theory, bad in its practical workings, bad in the results which in the long run it brings about. What is needed in the United States is rule by the people. The whole burden of the present discussion is the insistence upon the fact that the existing Constitution, however great its virtues in any particular respect, does not permit of genuine popular government. The rigidity of the electoral system, the divorce of the executive from the legislature, and the well-nigh un-

controllable power of the courts combine to centralize political power in the hands of a comparatively few individuals who are only remotely responsible to the people, and whose acts can be reviewed by the people only at long and fixed intervals. Until this outgrown system is changed, the merely political side of the national life will continue to be enormously exaggerated as it always has been, and its economic and social needs, in every way more significant, will be relegated to second place. The whole purpose of constitutional revision is to break the rule of class and restore government to the people.

Obviously, in such revision it is the whole people, and not merely some of the people, who are to be considered. A constitutional convention which gave place in its discussions only to the interests and ambitions of property, or of organized business, or of the farmers would be as defective an instrument as one which worked only for the interests of politicians, or organized labor, or journalists. It is the whole people that should now be regarded—the masses as well as the classes, professional workers as well as those who work with their hands at trades, men and women as yet socially unorganized equally with those who are organized, disciplined, and directed. And the representation of opinion should be as generous as the representation of groups. It were better that there should be no constitutional convention at all then that any proposal of reform, however startling or revolutionary or however

crudely phrased, should be ruled out of consideration in advance.

Happily, it has not been the policy of the American people to take counsel of its fears, or to draw back from experiments because the outcome could not be fully perceived in advance. The Federal Constitution itself was an experiment—one of the greatest experiments ever ventured by a political society. How clouded was the prospect of its success, how uncertain the likelihood that it would contribute to the stability and prosperity of a discouraged and disunited people, the history of the time abundantly shows. Now that the conditions with which it had to deal have changed, and the demand for a measure of popular initiative and control far beyond what was deemed practicable in 1787 has been voiced, the time has come for a new experiment which shall bring the people into their own. For the making of that experiment there are available, what were not available in 1787, a long political experience under conditions of independence, a general consciousness of national unity, and a highly developed industrial organization. If a revision of the fundamental law is ever to be undertaken, it should be before these favorable conditions are impaired by a growing volume of popular discontent with a constitutional system which has long since ceased to meet popular needs, and before class antagonism has become so acute that the common interests of the whole people cannot be soberly discussed.

CHAPTER XX

THE CONSTITUTIONAL CONVENTION

ARTICLE V of the Constitution reads as follows:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths therof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The special reservation in regard to the amendment of certain parts of Article I is, of course, obsolete.

Two regular methods of amendment, it will be

observed, are provided. The first, and the only one which down to the present time has been employed, is for Congress, two-thirds of the members of both houses concurring, to frame amendments and submit them to the States. The second is for Congress, at the request of the legislatures of two-thirds of the States, to call a convention which shall propose amendments. As to whether amendments framed by a convention shall be transmitted by the convention to Congress and submitted by Congress to the States, or whether the convention itself may lay the amendments directly before the States or transmit them through some other department of the government than Congress, the Constitution is silent. It is obligatory with Congress to summon a convention, however, if the legislatures of two-thirds of the States request it.

For the adoption of amendments, whether framed by Congress or drawn up by a convention, two methods are provided. The amendments may either be ratified by the legislatures of three-fourths of the States, or they may be ratified by conventions in three-fourths of the States. It is discretionary with Congress which method of ratification shall be employed, but the method of ratification by the State legislatures is the only one which thus far has been used. No one of the nineteen Amendments that have been adopted has ever been acted upon by conventions called for that purpose and representing directly the people of the several States.

A scrutiny of these provisions shows that the process of amendment has been carefully guarded. The same dread of direct popular initiative and control which appears in some of the most vital parts of the Constitution appears here also. There is no direct provision for a Federal convention unless the legislatures of two-thirds of the States ask for one; and while Congress is in terms under obligation to call a convention if one is asked for, it cannot be compelled to do so if it chooses to ignore the request. Nor is there any indication as to the period of time within which the required number of State legislatures must act in order to make their request effective. Further, even if a convention is held, Congress may in its discretion refuse to submit the amendments framed by the convention to conventions of the people in the several States, but may require them to be acted upon by the State legislatures. In the case of an amendment submitted by Congress, any or all of the State legislatures which are called upon to accept or reject it may have been elected before the amendment was proposed in Congress, and when the changes which it embodies could not have been discussed or voted on by the people of the State. Finally, it will be observed that there is no provision for summoning a Federal convention at all if the State legislatures do not call for one.

Before proceeding to consider which of the two possible methods of securing a constitutional convention it is most desirable to follow at the present

time, it will be well to inquire what limitations, if any, there are to the power of amendment. In particular, may revision properly go so far as to replace the present form of government with a form radically different? In other words, may a virtually new Constitution be framed under the guise of amending the existing one?

Neither in theory nor in fact does the question present any real difficulty. With the exception of the now obsolete reservation regarding two clauses in Article I, already referred to, the only provision of the Constitution which is expressly placed outside the scope of the amending power is that which guarantees to every State equal representation with every other State in the Senate unless the State itself shall consent to be unequally represented. Save for this provision, the whole Constitution is open to amendment. If we may apply to the interpretation of the Constitution at this point a rule of law which is commonly applied to the interpretation of written contracts or agreements, namely, that when exceptions have been specified it will be assumed that all were specified that were intended, it would seem to be a fair inference that the framers of the Constitution, in excepting permanently from the power of amendment one fundamental provision only, intended to leave all the remaining provisions, however fundamental any of them might be, freely open to change if Congress and the States should at any time desire to alter them.

It is hardly conceivable that any revision of the Constitution would be made which would not incorporate in the new text large and numerous sections of the present document. Anyone who has read attentively what has been said thus far will realize how many are the provisions of the Constitution in which no change whatever is proposed. Any technical demands of formal resemblance between the old Constitution and the new one which it might be felt proper to recognize would be abundantly met by this inevitable transference of large portions of the one instrument to the other. For the rest, the powers of a constitutional convention would be unrestrained save as to the single provision about the Senate, already referred to. They could not properly be limited by the State legislatures in asking for a convention nor by Congress in calling one. If any restrictions whatever were inserted in the resolution to which the convention owed its existence, the convention would be in duty bound to disregard them as an infringement of its undoubted constitutional right to deal with the question of revision in any way it saw fit.

Of the two possible methods of obtaining a constitutional convention, one only is directly contemplated by the Constitution itself. That is the method under which the State legislatures take the initiative, and by the concurrent action of two-thirds of their number impose upon Congress the duty of calling a convention. In view of the fact that not

two-thirds, but three-fourths, of the States must concur in ratifying an amendment, it can hardly be said that this method of obtaining a constitutional convention is impracticable. If the people themselves want a convention and are able to make their wish effective through their legislatures, there would seem to be little more difficulty, if any, in obtaining affirmative action on the question than on the question of ratifying an amendment. As a matter of fact, a majority of the State legislatures have already, at one time or another, passed resolutions in favor of a convention, although their action has been spread over such a period of time that Congress has not deemed it necessary to act upon it. In the cases of only two Amendments, those establishing prohibition and women suffrage, have elaborate national organizations been found necessary in order to secure either the submission of an amendment or its adoption. The remaining Amendments have been framed by Congress in response to what was believed to be a national propriety or a national need, have been supported by parties and by party leaders in Congress and in the country, and have been acted upon by the State legislatures in regular procedure and in accordance with their constitutional obligation.

The chief difficulty in applying at once the method for which the Constitution specifically provides would seem to be the lack of a concrete proposal upon which the State legislatures would be under

obligation to act. When a constitutional amendment is submitted by Congress the whole country is informed of what has been proposed, and every legislature has before it, at either its current or its next session, a definite constitutional duty to be performed. The mere general suggestion that the legislatures should vote in favor of a convention, however, unaccompanied by any definite proposition that would come before them in the regular course of legislative procedure, might, in the absence of a national organization to urge the matter, result in no effective action at all. The difficulty would be removed if Congress by resolution were to put itself on record as favoring a convention, and were to invite the State legislatures to request that one be called. Such action on the part of Congress would not only be entirely proper, but it would also give to the movement a tangible and definite form which it might otherwise lack, and which it would be very desirable that it should have if the favorable action of two-thirds of the States was promptly to be obtained. It would also have the further advantage of insuring a full preliminary discussion of the whole question by Congress and, presumably, by the country. Any opposition that there might be would thus have an opportunity to present its arguments in advance, rather than at the time when, the State legislatures having acted, the question of carrying out their request would be presented. With Congress voting in favor of a convention, affirmative action by the re-

quired number of States would probably be assured.

The other method of obtaining a constitutional convention is for Congress itself to summon such a body. One must face at the outset the objection that the letter of the constitution contains no provision for such action, and that the specific indication in the Constitution of two processes and two only by which amendments are to be made may perhaps be taken to mean that no others are to be resorted to. Nothing short of a national crisis of the utmost gravity, it will be urged, could justify Congress in violating the Constitution openly even if the end in view were the betterment of the form of government itself.

If the fact that certain methods of amending the Constitution are specified in that instrument were indeed to forbid the employment of other methods under any circumstances, the objection would be final. Happily for the people, it is not necessary to assume that they or their representatives in Congress are so bound. The absence of any specific provision in the Constitution for general revision through a convention, or for the summoning of such a convention by direct action of Congress, is perfectly natural. Those who framed the Constitution undoubtedly believed that the form of government which it embodied was the best which the American people could have conferred upon them, and they as undoubtedly expected it to endure. They were, to be

sure, wise enough to foresee that particular features of the Constitution might from time to time require change, and generous enough to make provision for change by a process of specific amendment. But it would have been strange indeed if, after hammering out a scheme through weeks of acrimonious debate, and with compromise quite as often as principle the governing motive, they had deliberately provided for overhauling the whole structure at any time that Congress might choose to call another convention for that purpose.

It must also be remembered, what is too often forgotten, that there was in 1787 no American "nation" which held the foremost place in the public eye. The only governments which at the moment exercised any real authority or commanded either affection or respect were those of the States. The imposing aggregation of force, numbers, wealth, organization, reputation, and precedent which the United States as a "nation" to-day presents had no existence in 1787; it existed only in imagination and hope. In thinking of possible amendment of the Constitution, accordingly, it was natural and proper to think of the State governments as continuing to possess a rightful power of initiating amendments or controlling their adoption. Congress might propose amendments, but it was the State legislatures which were to ratify them. On the other hand, if the State legislatures demanded a constitutional convention Congress was bound to summon one.

The provisions of the Constitution in regard to amendments may, accordingly, properly be viewed as permissive and selective, not as exclusive. They are not to be regarded as indications of the only possible methods which may under any circumstances be employed, but rather as methods which the convention of 1787 thought fit to indicate as appropriate in case particular amendments were desired. They are not to be taken as all-comprehensive, but rather as devices most obvious and appropriate at the time. The fact that other methods are not mentioned is not to be taken as a prohibition, provided the methods employed are appropriate and the object good. The statesman who, more than any other, laid the first foundations of American constitutional law, Alexander Hamilton, pointed out, in his famous opinion regarding the constitutionality of a national bank, that when the end in view was a good one any means which were appropriate to that end, provided they did not contravene any of the provisions of the Constitution and did not encroach upon any of the rights reserved to the States, might properly be employed by Congress in furtherance of the general welfare. The whole course of judicial interpretation of the Constitution has been in harmony with the principle which Hamilton laid down in 1791. It is not apparent that a principle which could sustain the constitutionality of a bank can have no application to a revision of the Constitution itself.

That the principle is so applicable is further enforced by the fact that the right to revise a Constitution, like the right to create a new form of government, is a fundamental right of the people which no constitutional provision may essentially limit and least of all deny. The utmost that may be said for any particular method of revising a Constitution which may be indicated is that, if the method is adopted, it must be followed in all respects as the Constitution prescribes. But the right of the people to change their form of government inheres in the people themselves. It is dependent upon their will, upon their own judgment as to when it shall be exercised. It is a right possessed by each generation irrespective of what may have been done in the past, save only that engagements or contracts lawfully entered into ought always in good faith to be observed. No interpretation of the Constitution which would tie the the hands of the people in the exercise of their right to determine how they shall be governed can be recognized as either good law or good sense. The preamble of the Constitution declares that it is "the people of the United States" who "ordain and establish this Constitution." The sovereign power which reared the framework of a national government is the same sovereign power which may reconstruct the building when and as it chooses.

The contention that such an exercise of sovereign power would be a defiance of the Constitution, and

hence an act of revolution, is beside the mark. The situation is plain. The Constitution in terms provides for amendment, not for general revision. To replace the present irresponsible government of President, Congress, and Federal courts by responsible government and at the same time to introduce such other features as are necessary to adapt the national government to present needs, would require such extensive changes in the text of the Constitution as to transcend any process of mere amendment and to necessitate a general revision. If, then, the people are bound to follow no methods save those indicated in the Constitution, which provides only for amendment, they can never revise their Constitution at all. They are chained for all time to the system which they now have—a system which has been obviously outgrown, which abounds in weaknesses and anomalies, and which in practice does not and cannot insure popular representative government. Such a situation would be absurd. The charge of preaching revolution rests upon those who, clinging to forms and precedents as the sum of political wisdom, would perpetuate this impossible condition, rather than upon those who, recognizing the inherent right of the people to control their own destiny, urge that that right be now exercised.

Either of the methods of procedure which have been discussed is available for the people's use whenever they see fit to employ it. The people may petition their State legislature to vote in favor of a con-

stitutional convention, and if two-thirds of the legislatures so vote the convention must be called. The disadvantage of this method is that a national organization of opinion might perhaps be necessary in order to secure affirmative action by a sufficient number of States. In order to avoid this difficulty, petitions may be addressed to Congress asking that body to invite action by the State legislatures, or any member of either house of Congress may present a resolution to that effect. Neither method, however, can prevent a delay of approximately two years in securing action by the required number of States, unless the legislatures were convened in special session. The simplest and most direct procedure, accordingly, is for Congress itself to summon a convention. The time required for choosing the members of the convention and bringing the body together for the work assigned to it need not exceed six months.

The formal composition of the convention is not a matter of great importance. For the prompt and effective dispatch of business the membership should not be too large. A membership not exceeding one-half of the combined membership of the House and Senate would be a convenient number. The members should be elected at a special election and on general tickets, and the elections should all be held on the same date. No member of Congress and no person holding any Federal office should be a member of the convention, but holders of State offices

should not be excluded if the people of a State desired to elect them. Congress should provide for all the expenses of the convention, including a suitable compensation for the members, and for wide general distribution of the text of the new Constitution which would be drawn up. The resolution summoning the convention should provide further that the new Constitution should be submitted for ratification to conventions in the several States, three-fourths of which must accept it in order to make it operative. The course followed in the case of the prohibitory amendment, which specifically requires the ratification of the amendment by the State legislatures should on no account be repeated. As is the case with new State Constitutions, the new Federal Constitution would itself provide for the transition from the old régime to the new. The whole procedure, in short, should be as simple, as direct, and as popular as possible, as befits a great and solemn national act of the people themselves.

[The portions of the Constitution which are now obsolete, either by the lapse of time or by the adoption of Amendments, are printed in italics, and the spelling and punctuation have been modernized.]

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

SECTION. 1. All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

SEC. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which *he* shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers, *which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and* excluding Indians not taxed, *three-fifths of all other persons.* The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; *and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their

speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the legislature thereof* for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; *and if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof, may make temporary appointments until the next meeting of the legislature which shall then fill such vacancies.**

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which *he* shall be chosen.

The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the

*Amended by Amendment XVII.

Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SEC. 4. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meetings shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may

adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which *he* was elected, be appointed to any

civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during *his* continuance in office.

SEC. 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the

Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The Congress shall have power:

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts

by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and

the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other useful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

SECT. 9. *The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year* 1808; *but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation *or other direct tax* shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.*

No tax or duty shall be laid on articles exported from any State.

*Superseded as to income taxes by Amendment XVI.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

SECT. 10. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of

the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SEC. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the

*United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.**

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

*Superseded by Amendment XII.

No person except a natural born citizen, *or a citizen of the United States at the time of the adoption of this Constitution,* shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SEC. 2. The President shall be commander-

in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may,

on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SEC. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty jurisdic-

tion; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason

shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV

SEC. 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which *he* fled, be delivered up, to be removed to the State having jurisdiction of the crime.

*No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.**

SEC. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any

*Abrogated by Amendment XIII.

other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, *that no amendments which may be made prior to the year one*

thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Con-

stitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
*President and Deputy from Virginia**

AMENDMENTS

ARTICLE I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II (1791)

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III (1791)

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor

*The remaining signatures are omitted.

in time of war but in a manner to be prescribed by law.

Article IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Article V (1791)

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against *himself,* nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Article VI (1791)

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an im-

partial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against *him;* to have compulsory process for obtaining witnesses in *his* favor, and to have the assistance of counsel for *his* defense.

Article VII (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law.

Article VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX (1791)

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X (1791)

The powers not delegated to the United States

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Article XI (1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Article XII (1804)

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President,

if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII (1865)

SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this Article by appropriate legislation.

ARTICLE XIV (1868)

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the mem-

bers of the legislature thereof, is denied to any of the *male* inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss

or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

ARTICLE XV (1870)

SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this Article by appropriate legislation.

ARTICLE XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII (1913)

SEC. 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

SEC. 2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: provided, that the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

SEC. 3. This Amendment shall not be so construed as to effect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII (1920)

SEC. 1. After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation.

SEC. 3. This Article shall be inoperative unless it shall have been ratified as an Amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX (1920)

SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this Article.